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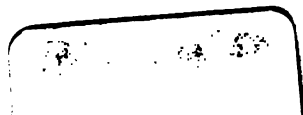


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REPORTS
OF
CASES IN CHANCERY,

ARGUED AND DETERMINED

IN
THE ROLLS COURT

DURING THE TIME OF

THE RIGHT HONORABLE
SIR JOHN ROMILLY, KNIGHT,
MASTER OF THE ROLLS.

BY
CHARLES BEAVAN, ESQ., M.A.,
BARRISTER AT LAW.

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A

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

MILLS v. BROWN.

1855.

April 20.

THE testator bequeathed to his nephew all monies that he might be possessed of in consols at the time of his death. He then proceeded as follows:—
“And as to all such parts of my estate and effects as shall not consist of ready money or money in the funds, I direct my executors to sell and dispose thereof, and to stand possessed of the monies to arise thereby, and with such ready money, and the money I may have in the *Long Annuities*,” upon trust, as to two-fourth parts, for the Plaintiffs, and the other two-fourths for other persons.

Where, in a residuary gift, specific property is bequeathed, the bequest may nevertheless be specific as to that particular property though general as to the rest.

A testator bequeathed his consols to A., and directed his executors to sell all such parts of his

The

estate and effects as should not consist of ready money or money in the funds, and “to stand possessed of the monies to arise thereby, with such ready money and the money he might have in the *Long Annuities*, upon trust” for A., B. and C. Held, that the *Long Annuities* were specifically bequeathed, and not liable to contribute towards the payment of general legacies.

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The testator died possessed (*inter alia*) of 40*l.* Long Annuities, and the rest of the property, other than the Long Annuities, being insufficient to pay the debts, the executor had paid a pecuniary legacy of 100*l.* out of the produce of the Long Annuities.

The question was, whether the Long Annuities had been specifically bequeathed or formed part of the testator's residuary estate, so as to be liable to the payment of the pecuniary legacies.

Mr. *Beales* (in the absence of Mr. *R. Palmer*), for the Plaintiffs, contended, that the gift of the Long Annuities was as specific as the gift of the consols, and that, though liable to payment of the debts, they could not be charged with the pecuniary legacy. He relied upon the case of *Bethune v. Kennedy* (a), as exactly in point. There the testatrix bequeathed as follows:—"The residue of my property, all I do or may possess in the funds, copy or lease hold estates," to my sisters for their lives. The residuary estate consisted of 150*l.* Long Annuities, and it was held, that as the gift of the leaseholds was specific, so was the bequest of the property in the funds.

Sir *C. C. Pepys* says (b):—"Now, as to the copyhold or leasehold estates, it is not disputed that the gift is specific. If so, why should it not also be specific with respect to the funds? The intention, it is reasonable and natural to presume, must have been the same with respect to both descriptions of property; and there can be no doubt that a bequest of all that a testator may possess in the funds would be a specific bequest of all

(a) 1 *Myl. & Cr.* 114.

(b) 1 *Myl. & Cr.* p. 116.

all his funded property, the rule being that the legacy is not the less specific for being general.

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“The true test by which to try whether a bequest is or is not specific, is to inquire what would be the result if there had been pecuniary legacies with a deficient fund, or a necessity for a sale for payment of debts, to inquire whether or not, in such a case, the bequest would have been protected in a competition with the claims of pecuniary legatees. A party claiming under a gift of all the property that a testator possessed of a specified kind, would not, I apprehend, be bound to contribute.”

In this case the gift is of “all the property I may have in the Long Annuities,” which, on the principle established in *Bethune v. Kennedy*, is clearly specific. He cited also *D’Aglie v. Fryer* (a); *Stephenson v. Dowson* (b); *Hayes v. Hayes* (c).

Mr. *Berkeley*, for the Defendant. In all the cases cited, as well as in *Bethune v. Kennedy*, the word “specific” is used by the Judges not in the ordinary sense of a “specific bequest,” but as denoting that the property was to be enjoyed specifically or *in specie* by a tenant for life. It is so used by the Master of the Rolls in *Pickering v. Pickering* (d); and in the same case on appeal (e), Lord *Cottenham* says, “as the Master of the Rolls appears to have observed, the word ‘specific,’ when used in speaking of cases of this sort, is not to be taken as used in its strictest sense, but as implying a question whether, upon the whole, the testator intended, that the property should be enjoyed in specie.”

The

(a) 12 Sim. 1.

(b) 3 Beav. 342.

(c) 1 Kern, 97.

(d) 2 Beav. 57.

(e) 4 Myl. & Cr. 299.

1865.

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The bequest is, therefore, not specific, properly so called, it is an enumeration of part of the residue. Suppose the testator had bought the Long Annuities after the date of the will, would the bequest then be specific? Clearly not, but they would fall into the residue, and the gift altogether would be considered a mere residuary bequest. He cited *Pickup v. Atkinson* (a); *Taylor v. Taylor* (b).

Mr. Beales was not heard in reply.

The MASTER of the ROLLS.

I am of opinion that this is a specific bequest of the Long Annuities. The cases relating to conversion of perishable property are different, and do not apply to this. The question in those cases was, whether the persons who were to take the property successively, were or were not to enjoy it in the character in which it was found, and it was held that they were. Here, if the Long Annuities had been given to persons in succession, I should have thought that the bequest was specific in that sense. I am of opinion that a specific bequest may be contained in a gift of a residue, and, in fact, it was so held in *Bethune v. Kennedy*. I think, therefore, that payments out of the Long Annuities to pecuniary legatees cannot be allowed; but the debts are payable thereout if there are no other assets to meet them.

(a) 4 Hare, 628.

(b) 6 Sim. 246.

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JAMESON v. STEIN.

THE testator *John Stein* was the owner of an estate called his *Wraxall* estate, and was indebted to his sister in the sum of 5,000*l.*

By indenture, dated 3rd of *September*, 1844, and made between *John Stein*, of the first part, his only daughter, *Monique Theresa Stein*, of the second part, and two trustees of the third part, after reciting that, in consideration of an arrangement entered into between *John Stein* and his daughter, concerning the property of her mother (then deceased), and of the release of her interest therein, *John Stein* had agreed to secure to his daughter an annuity for life, and to settle the *Wraxall* estate (subject to the payment thereof of 5,000*l.* and the annuity) upon his daughter and her issue, and reciting the debt of 5,000*l.* due from him to his sister, and that he was desirous of charging it upon the hereditaments thereby conveyed, it was witnessed, that *John Stein* granted the annuity to his daughter, and conveyed the *Wraxall* estate to his trustees in fee, upon trust, in effect, to raise the 5,000*l.* and the annuity,

July 14.

Where a person seeks to make a third party make good representations made by him on his marriage, he must establish, and that clearly, first, that sufficient representations were made; and secondly, that the marriage took place on the faith of them.

A husband and wife alleged, that, on their marriage, the wife's father stated in a letter, which, however, they stated had been destroyed, "that he could do no more for her than he had done, and that he had

settled his *W.* estate upon her." He had, in fact, previously settled that estate on her, but subject to a prior charge of 5,000*l.* They sought to have the representation made good, by payment of the 5,000*l.* out of the father's estate. The Court doubted whether the principle applied to such a representation, and also whether the marriage took place on the faith of it, and refused relief.

Whether the notice of the existence of the settlement in this case was not notice of its contents, *quære*.

The owner of an estate voluntarily charged it with his own simple contract debt, and, by the same deed, settled the estate, subject thereto, on himself for life, with remainder to his daughter. He afterwards paid off the debt, but declared that the charge should continue for the benefit of his personal estate. After his death, held, that the charge still subsisted and must be raised and paid.

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and, subject thereto, in trust for *John Stein* for life, with remainder to his daughter for life, with remainder to her issue, &c. &c.

The daughter did not execute the deed, but she acted on and adopted it.

On the 7th of *August*, 1847, by deed poll, indorsed on the deed of 1854, *John Stein* declared, that if he should pay the 5,000*l.* (which the deed recited it was his intention soon to do out of his own money), the same sum should remain charged upon the estate for his benefit, as part of his personal estate. *John Stein* paid off the charge, and by articles of agreement, dated the 29th of *November*, 1847, and made between the legal personal representative of *Ann Stein*, *John Stein*, and the trustees, after reciting the payment of the 5,000*l.*, it was witnessed and declared, that the trustees should stand seised of the estate, in trust, to secure the 5,000*l.* to *John Stein*, as part of his personal estate.

After these transactions, Miss *Stein* married. She had been brought up by, and usually lived with, her maternal grandmother; and in 1852, being engaged to be married to *William Maskell*, she and her intended husband both wrote to the settlor, to ask his consent, the latter also communicating to him his pecuniary circumstances, and the terms of the settlement he intended to make. Miss *Stein* received a letter from her father in reply, which he desired her to shew to *W. Maskell*, and in which (as was alleged) he stated, that he left her at full freedom with regard to the marriage, but that he should neither give his assent or dissent thereto, and desired her not to trouble him further in the matter; that he was not able to do more
 for

for her than he had done, and could give her no money on her proposed marriage, and he added, “ *I have settled my Wraxall estate upon you, worth I suppose 40,000*l.**” The marriage took place on the 7th of *September*, 1852. The letter was not produced, and Mr. and Mrs. *Maskell* stated, that, as the marriage was not cordially approved of by her father, they shortly after his death, not wishing, as they alleged, to preserve any remembrance of what they considered an expression of cool or indifferent feeling on his part, burnt or destroyed all their correspondence with him, and particularly this letter.

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John Stein made his will, dated in *December*, 1853, and which contained the following clause:—“ I have, by deed, settled my *Wraxall* estate on my daughter and her issue.” And he then declared, that he did not intend her to take any part of his estate, because he thought she was amply provided for. He gave to his nephew *James Stein* the residue of his real and personal estate, and appointed *Jameson* and *Haig* his executors.

The testator died in *January*, 1854, and a question arose as to whether the 5,000*l.* so charged upon the *Wraxall* estate, and subsequently paid off by the testator, formed part of his personal estate.

Mr. and Mrs. *Maskell* contended, that the testator had no power to charge the estate with the 5,000*l.*, after the debt of 5,000*l.* had been paid off. On the other hand, *James Stein* claimed the 5,000*l.* with interest, as a subsisting and valid charge, and as part of the testator’s residuary personal estate.

Mr. *R. Palmer* and Mr. *Nalder*, for the Plaintiffs, stated the case.

Mr.

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Mr. *Roupell* and Mr. *T. H. Terrell*, for *James Stein*, the residuary legatee. First, there is no sufficient proof of the alleged representation by the father, or that the marriage took place on the faith of it. Even as it is stated, there was no promise on his part to do anything for his daughter; on the contrary, he says, "he will do no more, and will give her no more money." He made no fraudulent misrepresentation. He merely states that the estate was settled, and that was true. The contents of the deed might have been ascertained, and the parties had therefore constructive notice of its contents.

Secondly, the 5,000*l.* now forms part of the testator's personal estate. All that was settled was the estate *minus* the charge, and in *Vandeleur v. Vandeleur* (a), it was held, that when the owner of an estate settles it, subject to debts of his own creation, his personal estate is exonerated. The debt, though discharged, was kept alive by express declaration, and it is unnecessary to refer to the numerous cases, in which it has been held, that a charge paid off by a tenant for life does not merge in the inheritance, but that he is entitled to it for his own benefit (b).

The MASTER of the ROLLS.—I think that unnecessary.

Mr. *Lloyd* and Mr. *Fleming*, for Mr. and Mrs. *Maskell*. First, it is clearly proved, that, on the marriage of his daughter, the testator made representations, which
 formed

(a) 3 *Clark & Fin.* 82; 9 *Bli. (N. S.)* 157; *Lloyd & G. (temp. Sugden)* 241, n.

(b) See *Burrell v. The Earl of Egremont*, 7 *Beav.* 205; *Forbes*

v. Moffatt, 18 *Ves.* 384; *Drinkwater v. Combe*, 2 *Sim. & Stu.* 340; *Trevor v. Trevor*, 2 *Myl. & K.* 675.

formed the foundation on which the marriage took place, and on the faith of which the intended husband acted. He represented that he had settled the *Wraxall* estate, worth 40,000*l.* a year, whereas he had only settled a portion of it, and its value was considerably less. In such cases, the Court has always held, that the father is bound by his representations, and must make them good; *Hammersley v. De Biel* (a); *Money v. Jorden* (b); *Bold v. Hutchinson* (c). In *Berrisford v. Milward* (d), the mortgagee was present while a mortgagor was in treaty for his son's marriage, and fraudulently concealed his mortgage on the estate then settled. He was postponed to the objects of the marriage settlement.

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Secondly, the 5,000*l.* was the debt of *John Stein* himself, for which he and his personal estate were primarily liable. The deed of 1844 merely created a security for it, and his personal estate still remained the primary fund for its payment. When the debt was paid off by the debtor, the charge fell with it, and could not be kept alive. There could be no charge where there was no debt. *Vandeleur v. Vandeleur* is inapplicable to this case, for there the debt, in question on the appeal, remained unpaid, and it was expressly "declared and agreed, by and between the parties," that the estate should be primarily charged. If the 5,000*l.* had not been paid at the death of *John Stein*, his personal estate would be the first fund to resort to for its payment. The charge therefore is merged in the estate, for the benefit of the parties entitled thereto; *Johnson v. Webster* (e). In confirmation of this, it is to

(a) 12 *Cl. & Fin.* 49; 3 *Beav.* 469.

(b) 15 *Beav.* 372; 2 *De G. Mac. & G.* 318; 5 *H. of Lds. Cas.* 185.

(c) 20 *Beav.* 250.

(d) 2 *Atkins*, 49.

(e) 4 *De G. Mac. & G.* 474.

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to be observed, that, on that assumption, the statement of *John Stein*, on his daughter's marriage, was strictly true; but if not, there was a fraud committed on the husband by the misrepresentation. The Court would lean to the former assumption, rather than impute a wilful misrepresentation.

Mr. *Borrett*, for other parties.

The MASTER of the ROLLS.

There are two distinct and separate questions in this case; one, upon the promise alleged to have been made by the testator on the marriage of his daughter; the other, upon the construction of the deed.

No person has felt more strongly than I have done the necessity of enforcing the equity, which I hold to be founded on one of the most valuable principles which this Court administers, of compelling a man to make good his words; and that, if a person says something or does something which is equivalent to it, in order to induce another to do a particular act, he shall be held, at the instance of those who have acted on the faith of those representations, bound to make good that which he has said or induced them to believe. But the difficulty I have in this case is this:—the representation made by the testator was in a letter written to his daughter, and the burden of proof lies on Mrs. *Maskell* to shew the contents of this letter. Now, it is a very different thing to produce the letter itself and to give parol evidence of its contents, for a very slight variation in expression would make a very considerable difference in its effect. What had occurred was this:—the testator had settled his *Wraxall* estate on his daughter

daughter and her issue, subject to a charge of 5,000*l*. When his daughter applied to him for his approval of her marriage with Mr. *Maskell*, he writes, in answer, a letter to be shewn to the intended husband, in which he says, (according to the statement now given of the contents of that letter, which is not itself produced,) "I am not able to do more for you than I have done, I have already settled my *Wraxall* estate upon you."

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Now I am by no means clear that the principle of the cases from *Atkins*, where a man concealed the existence of a debt, which could by no possibility have been known to the person who acted on such assertion except through the representation of the creditor, applies to this particular case, where, in fact, a knowledge of the contents of the settlement might have been obtained, by requiring its production or asking leave to examine it. It is also very possible, that a very slight qualification of expression might have given notice of the existing charges on this property, and of the representation being literally and precisely true to the extent to which the testator stated it.

I also entertain considerable doubt, whether, in fact, the marriage did take effect upon the faith of that letter. If it did, I do not understand why the letter itself should have been destroyed. It is stated to have been destroyed from a laudable motive, because the husband and daughter did not wish to keep alive anything that looked like a coolness on the part of her father on the occasion of her marriage. But this is not like a case in which a father has made a representation as an inducement for the marriage, and on the faith of which the marriage is to take place, nor a case where the intended husband is induced to enter into a marriage contract

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tract by reason of something which the father has done or has said he intended to. All that the father is alleged to have said he intended to do is this :—" I neither approve nor disapprove of the marriage, I shall do nothing more than I have already done for my daughter, I have already settled my *Wraxall* estate upon her." It appears that the estate really stood settled on the daughter, subject to a subsisting charge. It is therefore difficult to say, that this was a representation made by the father, to induce the husband to enter into the marriage contract, or one on the faith of which the marriage took place. I think, therefore, that those cases do not apply; and that, the burden of proof being upon Mr. and Mrs. *Maskell*, to establish that such a representation was made and that the marriage took place on the faith of it, the evidence before me does not establish those facts, so as to enable me to decree a specific performance of it, or to compel the father to make good that alleged representation.

Upon the construction of the deed itself, my opinion is also against Mrs. *Maskell*. The case is this :—When *John Stein* executed it, in *September*, 1844, he owed *Ann Stein* 5,000*l.* on simple contract. He thereupon gives her a security, charge or mortgage on this property. This differs, in no other respect, from the case of any other owner of an estate giving his creditor a security upon his property. It is true that an additional security was given to *Ann Stein*, whose claim was until then against the father personally, but that may be said in every case where the money is not advanced at the time the mortgage is executed; and yet I am not aware that different rights or equities exist, where the money is advanced previously to the date of the mortgage, from those where it is paid simultaneously with it and
 forms

forms part of the same transaction. Here a gentleman, owing this money, thought fit to secure it on his estate in the first instance, and then to settle the estate on himself for life, with remainder to his daughter and her issue. Some time afterwards he pays off the debt, but thinks fit to keep the charge alive by an express declaration in a deed executed by him. In what respect does this differ from the case of a stranger paying off a charge and taking an assignment of it(a)? The testator puts himself in the situation and position of the mortgagee, the charge remains subsisting and is part of his personal estate, and it is impossible for this Court to hold, that a charge affecting the *corpus* of the estate is merged in the estate of the tenant for life.

I think, therefore, that this is a subsisting charge on the estate.

(a) See *Noel v. Noel*, 12 Price, 213; *Sugd. Law of Property*, 123; *Allen v. Hogan, Lk. & Goo. (temp. Sugden)* 231.

1855.

JAMESON
v.
STEIN.

1855.

May 28.

June 1.

HONEYMAN v. MARRYAT.

When an offer in writing is made by the owner to sell an estate on specified terms, and this is unconditionally accepted, there is a binding contract, which neither party can vary, but the owner is entitled, at any time before his offer has been definitively accepted, to add any new terms to his proposal. If these be refused, the treaty is at an end.

The time for paying the deposit may be made an essential term for entering into a contract for sale of an estate.

THIS was a suit for the specific performance of a contract for sale of some freehold property at *Wimbledon*, belonging to the Defendant. The contest was, whether any binding contract had been entered into, that alleged by the bill being founded on a correspondence which had taken place between the Plaintiff's solicitor, on the one hand, and the Defendant's agent and solicitor, on the other.

The property having been advertised for sale by private treaty, by an estate agent employed by the Defendant, the Plaintiff's solicitor, on the 3rd of *March*, 1855, wrote to such agent as follows:—

“ *Wimbledon House Estate.*

“ I yesterday went over this property with a client of mine, and he has instructed me to make you an offer, amounting to 25,000*l.*,” &c. . . . “ Should you feel disposed to fall in with his views, on hearing from you to that effect, I will immediately put myself in communication with you as to the purchase. I shall feel obliged

The Plaintiff's solicitor wrote to the Defendant's agent, that he was instructed to make him an offer of 25,000*l.* for the purchase of his estate. The Defendant's agent wrote, in answer, that he was authorized to accept the offer, “ subject to the terms of a contract being arranged ” between the two solicitors. Held, that this was not a concluded contract.

In the above case, the owner's solicitor sent the draft of an agreement for the perusal of the purchaser's solicitor, which, amongst other stipulations, required a deposit of 1,500*l.* to be paid down. This term was objected to, and, after some delay, and before the Plaintiff had acceded to it, the Defendant required it to be paid and the agreement signed before a given day, or the treaty to be at an end. This was not complied with, but an offer was subsequently made to sign the agreement and pay the deposit required, which was refused. Held, that there was no contract that this Court could enforce.

obliged by your giving me an answer at your earliest convenience."

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On the 4th of *April*, the Defendant's agent sent the following answer:—"Mr. *Marryat* has authorized us to accept the offer made on behalf of your client, *subject to the terms of a contract being arranged between his solicitor and yourself*. Mr. *Marryat* requires a deposit of from 1,200*l.* to 1,500*l.*, and the purchase to be completed at *Midsummer-day* next." On the next day, the Defendant's solicitor sent to the Plaintiff's solicitor a draft agreement for the sale of the estate, for his perusal. This purported to be made between the Defendant of the one part, and a blank was left for the name of the purchaser on the other part. It purported to contract to sell the property for 25,000*l.*, whereof a deposit of 1,500*l.* was payable at the date of the contract, and it contained special conditions as to title, &c., and provided for the completion on the 24th of *June*.

The draft not having been returned, the Defendant's solicitor, on the 14th of *April*, wrote as follows:—"Mr. *Marryat* cannot allow the matter to stand open. The contract must be signed and deposit paid, or the treaty be at an end."

On the 20th of *April*, the draft was returned approved of, but with two alterations; one by which the deposit was reduced from 1,500*l.* to 1,200*l.*, and another, which it was stated was afterwards abandoned.

On the 21st of *April*, the Defendant's solicitor wrote to the Plaintiff's solicitor as follows:—"Mr. *Marryat* is much surprised at the delay which has taken place in settling the agreement for the purchase of this estate, and he has instructed me to inform you, on behalf of
your

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your client, that unless the agreement is completed and deposit paid on or before *Tuesday* next (a), at one o'clock p. m., for which purpose he will attend here on that day and time, he shall consider the treaty at an end."

On the 23rd of *April*, the Plaintiff's solicitor in answer stated, that as his client had left town it would be impossible to complete on the next day, as suggested, and asking to put off the appointment.

The Defendant's solicitor, on the 25th of *April*, wrote to the Plaintiff's solicitor as follows:—"I am instructed by Mr. *Marryat* to give you notice, that he will attend here to-morrow (b), at one o'clock, when, on payment of the sum of 1,500*l.*, he will be prepared to enter into a contract for sale of this property, and that if your client does not pay the deposit and enter into a contract for the purchase at that time, he will consider the treaty at an end."

The Plaintiff's solicitor, in a letter to the Defendant's solicitor, on the 26th of *April*, stated, "Before this agreement is signed, there is a question to be settled as to the amount of the deposit, and on which I must first take my client's views."

On the same day (26th of *April*), the Defendant's solicitor wrote as follows:—"Mr. *Marryat* declines to enter into a contract for the sale of the property without payment of a deposit of 1,500*l.* In consequence of your letter, Mr. *Marryat* has appointed to call here to-morrow (c), on his return from the city, at 3:30; and unless your client, or some person on his behalf duly authorized, meets him here, at that time,

(a) The 24th of *April*. (b) The 26th. (c) 27th of *April*.

time, and pays the deposit and signs the contract, Mr. *Marryat* will instruct Messrs. *Snell & Co.* to proceed to the sale of the property." Before sending this letter, the Defendant's solicitor received a letter from the Plaintiff's solicitor, offering to pay the deposit of 1,500*l.* any day after *Wednesday* next (*a*), whereupon the Defendant's solicitor added a postscript to his letter of the 26th, as follows:—"P.S. Since writing the foregoing, I have received your letter of this day. I beg to say that Mr. *Marryat* will not allow this matter to remain in its present unsettled state until after *Wednesday* next (*a*), and that he requires the terms before stated to be carried out." On the same day (26th of *April*) the Plaintiff's solicitor wrote to say that his client would not be prepared to pay the deposit until next week, and offering to pay the 1,500*l.* any day after *Wednesday* next (*a*), and asking for the engrossment, so that he might, in the meantime, get it executed.

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The Plaintiff did not pay the deposit of 1,500*l.* on the 27th of *April*, but on the following day (28th) his solicitor again wrote and offered to sign the agreement and pay the 1,500*l.* deposit any time after *Wednesday* (2nd of *May*). The Defendant, however, insisted that the treaty was at an end, and declined to renew it. The Plaintiff afterwards (on the 5th of *May*) tendered the 1,500*l.*, and offered to sign the agreement, but this also was refused, and he filed this bill for specific performance, alleging a contract to the above effect.

To this bill the Defendant put in a general demurrer.

Mr. *Roupell* and Mr. *Haynes*, in support of the demurrer.

Mr.

(*a*) *Viz.*, after the 2nd of *May*.

1855. Mr. *R. Palmer* and Mr. *Morris*, in support of the
 bill.
 HONEYMAN
 v.
 MARRYAT. Mr. *Roupell*, in reply.

Huddleston v. Briscoe (a); *Hyde v. Wrench* (b);
Ridgway v. Wharton (c), were cited.

June 1. *The MASTER of the ROLLS.*

The question on this demurrer is, whether the Plaintiff is entitled, against the Defendant, to the specific performance of a contract for the sale of a house and grounds at *Wimbledon*.

The contract alleged by the bill consists of certain letters written by the agents of the parties. The first letter was written from the agent of the Plaintiff to the agent of the Defendant, in these terms:—"I yesterday went over this property with a client of mine, and he has instructed me to make you an offer amounting to 25,000*l.*, &c. Should you feel disposed to fall in with his view, on hearing from you to that effect, I will immediately put myself in communication with you as to the purchase."

On the following day, the agent of the Defendant wrote this letter:—"We have received your letter of the 3rd instant, which we have communicated to Mr. *Marryat*, and he has authorized us to accept the offer made on behalf of your client, subject to the terms of a contract being arranged between his solicitor and yourself.

(a) 11 *Ves.* 583—591.
 (b) 3 *Beav.* 334.

(c) 3 *De G. M. & G.* pp. 677,
 693.

yourself. Mr. *Marryat* requires a deposit of from 1,200*l.* to 1,500*l.*, and the purchase to be completed at *Midsummer-day* next."

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There can be no question with respect to the rules upon which this Court acts in these cases, and I am of opinion, that if the words, "subject to the terms of a contract being arranged between his solicitor and yourself," had been omitted from this letter, these two letters would together have formed such a complete and perfect contract as this Court would have enforced. But Mr. *Marryat*, as he was entitled to do, would not enter into any agreement, except "subject to the terms of a contract being arranged between his and the Plaintiff's solicitor." In my opinion, this is rather a contract to enter into a contract, of which three of the terms were specified, that is to say, the amount of purchase-money, the time when the contract should be completed, and the amount of the deposit, and that the rest of the contract was to be made the subject of future communication between the parties themselves. I do not consider it, as has been argued before me, in the light of a counter proposal, but more properly in the light of a contract to enter into a contract, with respect to which the Defendant submitted to be bound by three of the terms, and, with respect to the remainder of the terms, they are to be settled by future arrangement, and, if they could be agreed on, then the contract was to be a valid contract.

On the following day, the solicitor of Defendant sent certain proposals, for the purpose of completing the remainder of the contract, consisting of nine different items, defined in the draft "Memorandum of an Agreement," which purported to be made between the Defendant on one part, and leaving a blank

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for the name of the Plaintiff (whose name had not been communicated to the Defendant) on the other. If upon these terms being received by the Plaintiff, he or his agent had written "I agree to and approve of these terms, and I am ready immediately to execute the contract," then, in my opinion, there would have been a binding and complete contract between both parties. But that was not done, and the question here is, whether, until the contract had been completed, and the terms of the contract finally settled between both parties, it was not open to either of them to make a stipulation as to the deposit payable, in addition to and beyond that which had been at first specified.

Now if I am right in the view I take of this case, that these two letters constituted a contract, of which some of the terms were fixed and the others remained to be settled, then it follows that the remaining terms of the contract were to be treated exactly in the same view as if that had constituted the first communication between the parties.

I apprehend it is quite clear, that if the owner of a property writes to another person and states to him, "I am willing to sell my estate to you for 25,000*l.*," with certain other specified terms, and the person to whom that communication is addressed writes back in return, "I accept your offer," without more, that binds both parties, and neither party is at liberty to add to or qualify the terms of the contract. But if before the answer is sent the owner says, I omitted something which I consider essential, and I desire that it shall be one of the terms of the contract to be entered into between us, he is at full liberty to do so, and has full power to vary his proposal, at any time until it has been actually accepted; and if this offer is not accepted, but the
person

person to whom it is addressed refuses the contract, the matter is then at an end, and it is no longer in his power to accept the offer at a later period, if he should be disposed to do so, for the treaty is then at an end.

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What afterwards occurred in the present case is this:—The draft agreement was sent on the 5th of *April*; a considerable time elapsed before any steps took place, and very little that is material passed in the interval before we get to the 21st of *April*, further than this:—that the solicitor of the Defendant complains of the delay, and states that he cannot allow the matter to stand open. On the 21st of *April*, the Defendant's solicitor writes a letter to the Plaintiff's solicitor, complaining of the delay which had taken place in settling the agreement, and informing him that unless the agreement is completed and deposit paid on or before *Tuesday* next, Mr. *Marryat* will consider the treaty at an end. The 21st of *April* was a *Saturday*, and the day fixed, being the *Tuesday*, was consequently the 24th of *April*.

Now I consider this analogous to the introduction of a new term into the contract. It is saying, "I require the deposit to be paid on or before a particular day." The Defendant was undoubtedly at liberty, in my opinion, to make that a term of the original contract, nor can I see any difference between the making that a term of the original proposal and introducing it subsequently. The contract which he suggests and proposes is an offer to this effect:—I am willing to sell my estate to you for 25,000*l.* on your paying a deposit of 1,500*l.* [*His Honor here recapitulated shortly the special terms in the draft agreement.*] All these are various terms of the contract which he suggested, and if he had added to those, "the deposit must be paid on or before the 24th

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24th of *April*," that would have been as perfectly good and valid as any one of the other terms specified in the draft contract. If any one of those terms had been omitted from the first proposal, he might, in my opinion, have afterwards introduced them, at any time before the Plaintiff had given an unqualified acceptance of the terms of the original proposal. Suppose, for instance, there had been omitted from the contract a stipulation that the purchaser should not inquire into the identity or title of a little patch of copyhold land, consisting of a rood or two roods in the middle of the property, and before the offer had been accepted by the Plaintiff, the Defendant had said, he had omitted, either from forgetfulness or otherwise, to include in the terms of the contract this stipulation:—that you should not inquire into the title or identity of that bit of land; I apprehend it would have been perfectly open to him to do so, and that the Plaintiff, who would have been at full liberty to have accepted the original offer before, was bound, after the addition had been made, either to accept the offer with the additional term introduced into it, or to reject it altogether. I consider a stipulation for the payment of the deposit money at a particular time exactly in the same point of view, and that the Defendant was at liberty to introduce it at any time before the offer had been accepted by the Plaintiff. The answer to the letter of the 21st was this:—" I have introduced one or two alterations into the contract for your client's consideration, but it is not possible for us to complete by *Tuesday*," therefore the time is extended by Mr. *Marryat's* solicitor to *Wednesday* (the 25th); and on that day (the 25th) he writes to the Plaintiff's solicitor, " I am instructed by Mr. *Marryat* to give you notice, that he will attend here to-morrow at one o'clock, when on payment of the sum of 1,500*l.* he will be prepared to enter into a contract for the sale of

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of this property, and that if your client does not pay the deposit and enter into a contract for the purchase at that time, he will consider the treaty at an end."

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There certainly was no concluded contract at that time, for up to that time (the 25th of April) the terms sent by Mr. *Marryat*, and which were to be settled between the parties and to form a portion of the contract, had not been agreed to or approved of by the Plaintiff or his solicitor. [*His Honor next referred to the subsequent proceedings:—The extension of the time for paying the deposit to the 26th, and afterwards the 27th of April; the counter proposal of the Plaintiff on the 26th to pay it after Wednesday the 2nd of May; the refusal of the Defendant's solicitor to concur therein; the default of payment on the 27th of April, the subsequent declaration of the Defendant's solicitor on the 28th, that he considered the treaty at an end; and the tender and refusal on the 5th of May; and he proceeded.*]

Now the question really is, whether in that state of circumstances the contract was ever concluded? What I have already stated shews, that in my opinion, it was not, and that it was open to either side, consistently with the terms already agreed upon by the two first letters, to add fresh stipulations to the proposed contract, until the terms proposed by either side had been definitively accepted by the other. Mr. *Marryat* did propose and insist on a term to be added to the contract, which was not agreed to or accepted, and which it has now become impossible to comply with. If the term had been an unreasonable one, if it had been one that had been manifestly made for preventing the contract being entered into, then a different view of this case might have arisen, which at present, in my opinion, it does not admit of. The aspect of the case would

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would then have been changed, and might have been different from what it appears at present.

The case is complicated from this circumstance :—that the term relates to the time when the deposit money shall be paid, and the Court of Chancery does not, except in very special cases, allow time to be of the essence of the contract (*a*). But the distinction between this case and the cases which relate to time being of the essence of the contract is this :—that in the latter cases there is a concluded agreement, a contract actually entered into, and then the Court considers it inequitable that, by reason of a slight delay, one party to the contract should not have the benefit of that for which he has contracted. But that is a totally different matter from this :—whether a person is not at liberty to make a contract in which time shall be introduced as one of the terms of the contract? I look at it exactly in this point of view, as if Mr. *Marryat* had said, “I require, as one of the terms of the contract, that the deposit shall be paid on or before the 24th or 25th of *April*,” and the opposite party had said, “I agree to all the terms of the contract except that, for I shall not be able to pay the deposit within that time, I shall not be able to pay it until the 3rd of *May*.” The question is, whether under those circumstances, Mr. *Marryat*, under the terms of these first two letters, would have been bound to enter into such a contract. I am of opinion that he would not; and whatever might be the effect of such a contract when once entered into, to say that he should not be allowed to insist on such a stipulation forming part of the contract, would be going far beyond any of those cases in which the Court has regarded time as not of the essence

(*a*) *Parkin v. Thorold*, 16 *Beav.* 59.

essence of the contract. It would go to this extent, that a person might not contract that time should be of the essence of the contract. In my opinion, this agreement was not concluded; this was a term which he chose to have added, which was not an unreasonable term, and was not introduced for the purpose of making it impossible for the other party to enter into the contract. My opinion is, therefore, that there was no concluded agreement between both parties, and that this demurrer must be allowed.

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NOTE.—An appeal to the House of Lords is pending.

WILSON v. WILSON.

June 7, 8.

UNDER his marriage settlement, made in 1825, *William Wilson*, who had survived his wife, had a life interest and a power of appointing a trust fund amongst the issue of the marriage. The settlement directed, that the trust property should "after the death of the survivor of the intended husband and wife, be paid and made over to the child or children of the marriage, and to the issue of such child or children who should have died leaving issue, in such shares" as Mr. *Wilson* should appoint, and in default of such appointment, "then the same was to be divided among the children equally, the issue of such of them as should have deceased being to draw the shares which would have fallen to their respective parents if living."

Under his marriage settlement, *A. B.* had a power of appointing a fund amongst his children. By his will he appointed the fund equally amongst his eight children; but he afterwards postponed the payment of the capital, partly until the majority of the children, and partly until after the death or marriage of his last sur-

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living unmarried daughter, the unmarried daughters being in the meanwhile entitled to the income. The appointment was held valid.

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By his will, dated in *March*, 1853, Mr. *Wilson*, after referring to the power of appointment, directed, that after his "death the trust fund should be divided among his two sons *William* and *Charles*, and his six daughters *Henrietta*, *Annie*, *Jane*, *Katherine*, *Margaret* and *Emily*, (the lawful issue of any of whom shall take the share or portion that would have fallen to the parent if alive) in equal shares or one-eighth respectively to each of such children above named, but in manner following, viz., that no portion of any such share shall become payable to any of my said children (unless it be by the express sanction of my executors hereinafter named for the settlement in life, or advancement in his calling, or the education of either of my said sons) before such child shall have attained the age of twenty-one years; that no greater portion than the half of such equal share as shall fall to my daughters shall be withdrawn from the hands or control of the then existing trustees or trustee, or the executors hereinafter appointed, or shall be payable to such daughters or daughter, or their order, so long as any one or more of such daughters shall remain unmarried, and that the remaining half share to each of such daughters or their lawful issue only on the marriage or death of my last surviving unmarried daughter; that the interest or income arising from the capital stock or investment or purchase, remaining under the control of such trustees or executors, shall be for the benefit of such daughters or daughter as shall remain unmarried, and shall be payable to them or her for their conjoint or separate use; that the portions or shares falling respectively to my two sons (after deducting therefrom any sum or sums that may have been raised or advanced by the trustees or trustee for the time being for their or his especial use, according to the terms mentioned in such marriage settlement or in this my will) may be claimed by them, or either of them, to the extent

extent only of three-fourths of such shares or portions, and that the remaining one-fourth part shall remain in the hands of such trustees or executors for the benefit of any such unmarried daughters or daughter, and shall become payable on the death or marriage of the last of such unmarried daughters. And I also will and direct that it shall not be lawful for any such daughter, dying unmarried, to dispose of the share or portion derivable to her under the foregoing marriage settlement or this my will, but that the same shall remain in the hands of such trustees or executors for the benefit of any surviving unmarried daughters or daughter, and shall, on the death or marriage of such last-surviving unmarried daughter, be divisible amongst my said children, or their lawful issue, as hereinbefore set forth."

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The testator died in *December*, 1854, leaving all the eight children surviving.

Under these circumstances a question was raised whether the will was a due execution of the power of appointment given by the settlement, or a due execution so far as it directed the postponement of the payment of the capital of the trust fund or any of the shares thereof.

The bill was filed for a declaration as to the rights and interests of the parties.

Mr. *R. Palmer* and Mr. *Milne*, for the Plaintiffs, referred to 2 *Sugd. on Powers* (a).

Mr. *Sandys*, for the executrix.

Mr.

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Mr. *Turner*, for the son *Charles Alexander Wilson*.

Mr. *Schomberg*, for the trustees.

June 8.

The MASTER of the ROLLS.

I do not think there is a great deal of difficulty with respect to the construction of this will. The settlement appears to me to have clearly made the children of the marriage and the issue of a parent who had died before the survivor of Mr. and Mrs. *Wilson* the objects of the power.

Then Mr. *Wilson* has, by his will, expressly professed to execute that power, under which he had the power of appointing the fund amongst all the objects of the power, in such manner and proportions as he pleased. He might, therefore, if he had thought fit, have given a life interest in one share to one, and the capital of it to another. What he does is, to divide it, in fact, into eight shares among his six daughters and his two sons, and then he directs that the share of each daughter shall be divided into two parts, and that one-half shall be paid to her on attaining twenty-one or marriage, and the other half shall be retained and the interest applied for the benefit of his unmarried daughters, and upon the death of the surviving unmarried daughter, the capital of the fund is to be divided among his children and their issue. He says, "will be divisible amongst my said children or their lawful issue, as hereinbefore set forth." I think that is perfectly valid, and that the meaning of it was to keep this one-half set apart for increasing the provision for the unmarried daughters, and that on the death of the surviving unmarried daughter, when that event occurred, it was to be divided amongst
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the objects of the power; that is to say, amongst the sons and daughters, or if there had been any, the issue of such of them as had died before the survivor of Mr. and Mrs. *Wilson*, which event did not occur.

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I shall, therefore, make a declaration to that effect.

LITTLEJOHNS v. HOUSEHOLD.

THE testator by his will, dated in *October*, 1822, devised a freehold house to his three daughters, *Catherine*, *Ann* and *Elizabeth* for life, and after their decease to his three grandchildren, *Catherine*, *Christiana* and *William*, their heirs and assigns, share and share alike; and he authorized his trustees to convey and assure the said freehold messuage to his said grandchildren, their heirs and assigns, in such shares as aforesaid. And in the event of the death of either of his said grandchildren in the lifetime of his said daughters, then the testator desired that the share of them so dying should be *transferred* to the *survivors*, and if only one should be living, then to him or her so *surviving*.

The daughter, *Catherine*, survived her two sisters and the three grandchildren, and she died in 1854.

Christiana, the survivor of the three grandchildren, died in 1852.

June 21, 22.

Devise of real estate to three daughters for life, and after their decease to three grandchildren as tenants in common in fee; and in case of either of the grandchildren dying in the lifetime of the daughters, the share of them so dying to be "transferred" to the "survivors," and if only one should be living, then to him or her so "surviving." The survivor of the daughters outlived the three grandchildren.

Upon

survivorship had reference to the death of the last tenant for life and not to a survivorship between the grandchildren, that the divesting clause never took effect, and that, on the decease of the survivor of the three daughters, the heirs of the three grandchildren took as tenants in common in fee.

Held, that the

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 v.  
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Upon the death of the testator's daughter *Catherine*, the Plaintiff, as the heir of *Christiana*, the surviving grandchild, claimed to be entitled under the will and, in the events which had happened, to the entirety of the freehold house. On the other hand, the Defendant, the heir of the grand-daughter *Catherine*, claimed to be entitled to one-third part as the heiress at law of her mother.

Mr. *Roupell* and Mr. *W. D. Evans*, for the Plaintiff, contended that *Christiana*, having survived the other two grandchildren of the testator, became entitled under the last clause of the will to the entirety of the premises; *Scurfield v. House* (a); *Antrobus v. Hodgson* (b); and therefore that the Plaintiff, her heir-at-law, was now entitled thereto. They distinguished the case from *Harrison v. Foreman* (c); *Sturges v. Pearson* (d).

Mr. *R. Palmer* and Mr. *W. Hetherington*, for the Defendant. The question is, whether the words "survivors" and "surviving" are to be construed as meaning the survivors of the three grandchildren *inter se*, or survivors at the death of the last of the tenants for life. The latter is the proper construction, for the death of the last of the tenants for life was the period of divesting the estate if it was to be divested, or of transferring it if it was to be transferred. It was then to be transferred, but to whom? Why, of course to the three grandchildren. The trustees had to deal with the estate till the death of the last of the tenants for life, and then the trust was satisfied and at an end, and all the limitations as to survivors were gone, for there was no limitation over. There is, in short, a trust, then a determination  
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(a) 3 Bro. C. C. 98.  
 (b) 16 Sim. 458.

(c) 3 Ves. 397.  
 (d) 4 Mass. 411.

of that trust, but the limitation divesting the estate in favour of survivors or a survivor is gone, because there was none at the death of the last tenant for life. The point was decided in the case of *M<sup>r</sup> Donald v. Bryce* (a). They cited *Ware v. Watson*, decided recently by the Lords Justices; *Cripps v. Wolcott* (b); *Sturgess v. Pearson* (c); *Williams v. Tarrt* (d); *Eaton v. Barker* (e); *Roberts v. Burder* (f); *Wagstaff v. Crosby* (g); *Taylor v. Beverley* (h); *Harrison v. Foreman* (i).

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**Mr. Phillips**, for another Defendant, took no part in the discussion.

**Mr. Roupell**, in reply. One rule has been laid down in *Cripps v. Wolcott* (b), and another in *Sturgess v. Pearson* (c), and the question is, which is applicable to this case. The survivorship of the grandchildren ought to be construed survivorship *inter se*.

#### *The MASTER of the ROLLS.*

I think there is not much difficulty on the face of this will. There is a plain gift for life in the first instance to the testator's daughters, and there is a clear vested remainder to the three grandchildren as tenants in common in fee, which cannot be taken away or divested except by express words. The words are—[*His Honor read the divesting clause.*] Those being the words, the question is, in the first place, when is the transfer of the estate to take place? It can only take place after the death of the surviving tenant for life, that is, after the death  
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(a) 16 Beav. 581.  
(b) 4 Madd. 11.  
(c) 4 Madd. 411.  
(d) 2 Coll. 85.  
(e) 2 Coll. 124.

(f) 2 Coll. 130.  
(g) 2 Coll. 746.  
(h) 1 Coll. 108.  
(i) 5 Ves. 207.

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of the surviving daughter of the testator. The same period must be the time for divesting the estate, in case it was divested. "Surviving," therefore, at the end of the clause, means surviving the last tenant for life. The case of *Cripps v. Wolcott*, therefore, clearly applies to this case, and this is made clear by the word "transferred," because there could be no transfer till after the death of the last tenant for life; and *Sturgess v. Pearson* also applies, for in that case the gift was a vested interest subject to be divested in favour of survivors, but none survived, and therefore there was no divesting.

*Antrobus v. Hodgson* (a) does not apply here, for that was a case in which the question arose between the survivor and a residuary legatee, and not between the survivor and the representatives of a predeceased legatee, the Defendant *Hodgson* being, in fact, the representative of both children. The question there was, whether the gift was vested at all, there being no gift to the children but in the direction to pay.

I am of opinion that *Sturgess v. Pearson* and *Cripps v. Wolcott* apply, and that the word "transferred" makes it quite clear that the shares vested in the grandchildren and passed to their representatives. The Plaintiff, therefore, takes his two-thirds, one as heir of *Christiana* and the other as representing *William*, and the Defendant *C. M. Household* is entitled to one-third.

(a) 16 *Simons*, 450.

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1855.

FRUER v. BOUQUET.

June 23, 26.

**JAMES CASTLE**, the testator, by his will, dated **in March, 1818**, bequeathed pecuniary legacies of **20l.** each to the wives of his two executors, *John Agombar* and *Alexander Truss*, and to *Agombar* himself he gave "the Bible and Testament in two volumes;" but he made no residuary bequest.

Under the law, prior to the 1 Will. 4, c. 40, the gift of a legacy to the wife of the executor does not prevent his taking the undisposed-of residue beneficially.

The testator died a few days after, and the will was proved by both executors, the property being sworn under **600l.** *Truss*, who was the acting executor, survived *Agombar*, and died in *September, 1851*, having by his will bequeathed his residuary personal estate to three charities, and appointed the Defendants *Bouquet* and *Clements* executors.

After the death of *Truss*, application was made to his executors for an account of the residue of *Castle's* estate, and several communications took place between the solicitors of the parties, in consequence of which search was made among the papers of *Truss*, and the residuary account was found. From this it appeared, that the balance in hand, after payment of the legacies, was **220l. 8s. 1d.**, that the duty of **10l.** per cent. had been paid upon that sum, and that the executors intended to retain the remainder for their own use. It did not appear whether any portion of the balance had been received by *Agombar*, whose representative was not a party to the claim.

The original claim was filed in *October, 1852*, but in *May, 1855*, the name of *Rebecca Fruer* was, by arrange-

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ment, substituted for that of the original Plaintiff, the amended claim being by *Rebecca Fruer*, on behalf of herself and all other, if any, the next of kin of the testator, *James Castle*, against *Bouquet* and *Clements*, for the administration of his residuary personal estate.

The case having arisen before the statute of 1 *Will.* 4, c. 40, the question was, whether the executors were beneficially entitled to the residue, or took it as trustees for the next of kin, and thus involving the question, whether the gift to the wives of the executors was to be considered as a gift to themselves.

Mr. *Lewis* for the Plaintiff. The case, having arisen before the statute, is governed by the law existing prior thereto, and the question is, whether the executors take the residue beneficially, or hold it merely as trustees for the next of kin. Here the legacies to their wives are in fact legacies to themselves, and therefore, according to the authorities, the testator did not intend them to take the residue beneficially, but as trustees. *Dawson v. Clarke* (a); *Giraud v. Hanbury* (b); *Mordaunt v. Hussey* (c); *Petit v. Smith* (d); *Farrington v. Knightly* (e); *Pratt v. Sladden* (f); *Russell v. Clowes* (g); and see *Love v. Gaze* (h).

Mr. *Roupell* and Mr. *W. D. Lewis*, *contra*, contended that the executors took beneficially, and cited 2 *Rop. Leg.* (i), and the cases there referred to.

Mr. *Lewis*, in reply, cited *Muckleston v. Brown* (k).

*The*

- (a) 18 *Ves.* 254.
- (b) 3 *Mer.* 150.
- (c) 4 *Ves.* 117.
- (d) 1 *P. Wms.* 7.
- (e) 1 *P. Wms.* 544.

- (f) 14 *Ves.* 197.
- (g) 2 *Coll.* 648.
- (h) 8 *Beav.* 472.
- (i) Page 640 (3rd edit.)
- (k) 6 *Ves.* 64.

*The MASTER of the ROLLS* said, the only question on the will was, whether the gift to the wives of the executors was a gift to the executors themselves, and that he would consider the point.

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v.  
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*The MASTER of the ROLLS.*

The question on this claim arose upon the construction of the will of *James Castle*, in respect to a point which cannot arise upon any will made since Sir *Edward Sugden's* Act, which alters the law with respect to the right of executors to the residue undisposed of. The question is, whether the executors take the residue undisposed of beneficially. It is clear, that under the old law, the executors take everything undisposed of, unless you can shew on the will that that was not the intention of the testator. The case of *Foster v. Munt* (a), in which Lord *Jeffries* decided, that where a legacy is given to executors for their care, they do not take the residue undisposed of beneficially, but are trustees for the next of kin, has been followed since in various other cases, with slight variations. In this case, the only circumstance to indicate the intention of the testator that they are trustees is, that the testator gives to the wife of each of the executors the sum of 20*l.*, which, it is contended, is equivalent to a gift to the executors themselves, because, as they will be entitled to receive and to give a discharge for the legacy, they will thereby take an equal benefit. It seems very unlikely, if the testator intended a benefit to his executors, that he should not have given it to them distinctly. It is also possible, that the legacy to the wife might have been settled by the marriage settlement of the wife, as by

June 26.

(a) 1 *Vernon*, 473.



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by a covenant therein contained to settle any legacy which might come to her, and if so, it would be taken out of the executor's power. In this case, the testator died in 1818, and the suit was not commenced till 1854, thirty-six years after, and when the property had been enjoyed ever since by the executors. I am of opinion, that I cannot now treat these legacies to their wives as legacies to themselves; the interest is separate and distinct. It is possible that the husbands might have been entitled to receive them, but at this distance of time I cannot ascertain this, and if the legacies had been of large amount the wives would have had an equity to a settlement thereout.

I have not been able to find any authorities on the subject except two, which, though not directly in point, have some bearing on it. One is the case of *Newstead v. Johnston* (a), and is, in the reasoning, the converse of the present case. The other case is *Wilson v. Ivat* (b), in which Sir *John Strange* held, that an executor was not excluded from taking the residue, by a real estate given to his wife. That is, that a gift to the wife of the executor, though it conferred a benefit on the husband, for he would take the rents during the joint lives of himself and his wife, did not exclude him from the residue.

I am of opinion, on the construction of the will, in the present case, that the presumption in favour of the executor is not rebutted, and I must dismiss the claim without costs.

(a) 2 *Atk.* 45, and better reported 9 *Modern*, 242.

(b) 2 *Ves. sen.* 166.

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## SIMMONS v. ROSE.

June 29.

**T**HE testator, *Lewis Rose*, after directing payment of all his debts, devised the residue of his freehold and copyhold estates to trustees, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to sell and absolutely dispose of the same, and the testator directed that the moneys to arise from such sales should be deemed to be part of his personal estate, and that the rents and profits of the hereditaments, till their sale, "should be deemed to be part of the annual income of his personal estate," and that the same moneys, rents and profits should be subject to the dispositions thereafter made concerning his personal estate, and the annual income thereof, respectively. And as touching his personal estate, he bequeathed the same to his said trustees, upon trust to invest the same in consols, and pay certain legacies; and he appointed the trustees his executors.

The testator, after directing payment of his debts, devised his real estate to his executors, upon trust to sell, and he directed that the produce should be deemed part of his personal estate, and that the rents, until the sale, should be deemed part of the annual income of his personal estate, and that the same moneys and rents should be subject to the disposition thereafter made of his personal estate and the income thereof; and he bequeathed his personal estate to his trustees to invest it in consols, upon trust to pay certain legacies. Held, that the real and personal estate were blended, and

The testator died in 1853. The question which arose between the heir-at-law and next of kin was, whether, upon the construction of the testator's will, the debts and legacies were to be paid primarily out of the personal estate, or out of the real and personal estate rateably, as a common fund.

**Mr. Haynes**, and **Mr. Lewin**, for the trustees.

**Mr. Lloyd** and **Mr. G. L. Russell**, for the next of kin, argued

applicable *pari passu* in payment of the debts and legacies.

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argued that the testator had directed a sale of the realty, and blended the real and personal estate, so as to render the debts and legacies payable out of that common fund.

Mr. Roupell and Mr. E. F. Smith, for the heir-at-law, argued, that the personal estate was, as in other cases, the primary fund for payment of the debt and legacies, and that the real estate only came in aid. The cases of *Roberts v. Walker* (a); *Stocker v. Harbin* (b); *Salt v. Chattaway* (c); *Bootle v. Blundell* (d); *Fitch v. Weber* (e); *Boughton v. James* (f); *Boughton v. Boughton* (g); *Robinson v. Taylor* (h), were cited. And see *Hopkinson v. Ellis* (i); *Shallcross v. Wright* (k); *Falkner v. Grace* (l); *Robinson v. Governor of London Hospital* (m); *Attorney-General v. Southgate* (n); *West v. Cole* (o); *Young v. Hassard* (p); *Tench v. Cheese* (q), on appeal; *Tatlock v. Jenkins* (r); *Cradock v. Owen* (s); 2 *Jarman on Wills* (t), were cited. And as to the effect of blending funds, see *Genery v. Fitzgerald* (u); *Mirehouse v. Scaife* (x), and *Bench v. Biles* (y).

#### The MASTER of the ROLLS.

I think I should be striking express words out of this will, if I were to hold, that the real estate was applicable merely in aid of the personal estate, and to be applied,  
 only

- (a) 1 Russ. & Myl. 752.
- (b) 3 Beav. 479.
- (c) 3 Beav. 576.
- (d) 1 Mer. 193; 19 Ves. 517.
- (e) 6 Hare, 51.
- (f) 1 Coll. 33.
- (g) 1 H. of L. Cas. 406.
- (h) 1 Ves. jun. 44.
- (i) 10 Beav. 172.
- (k) 12 Beav. 505.
- (l) 9 Hare, 282.
- (m) 10 Hare, 22.

- (n) 12 Sim. 81; reversed 12 L. J. (N. S.) Ch. 147.
- (o) 4 Y. & Coll. (Exch.) 462.
- (p) 1 Jones & Lat. 470.
- (q) 19 Beav. p. 28.
- (r) 1 Kay, p. 656.
- (s) 2 Smale & G. 241.
- (t) Page 549.
- (u) Jacob, 468.
- (x) 2 Myl. & Cr. p. 708.
- (y) 4 Madd. 187.

only so far as the personal estate was deficient, for payment of the debts and legacies ; for there is an express direction, not merely to convert it out and out, "to sell and absolutely dispose" of it, but a direction that the moneys arising from the sale shall be deemed part of the personal estate. The will also provides, that in the meantime, and until the property is sold, the income shall be deemed part of the annual income of his personal estate. Then the testator goes on to say, that the same moneys, rents and profits, that is the produce of his estate, shall be subject to the disposition thereafter made concerning his personal estate and the annual income thereof. And, as touching his personal estate, (that is to say, the whole fund, for he makes it all personal estate, and one fund,) he bequeaths it to his executors, and directs them to hold it on trust to pay a great many of the legacies.

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I think this is a stronger case than *Roberts v. Walker*, for he creates and makes it one fund of personal estate in the hands of the trustees for the purposes of his will.

I am therefore of opinion, that in this case the real and personal estates must be applied together for the purpose of the payment of these legacies.

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NOTE.—Affirmed by Lord Crenworth, January 18, 1856.

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1855.

June 30.  
July 6.

RUMSEY *v.* RUMSEY.  
*Ex parte* J. C. RUMSEY.

According to the new practice, under the 15 & 16 *Vict.* c. 86, s. 56, in cases of sale by the Court, an abstract of title is submitted to Counsel to prepare the conditions of sale. Counsel having made certain queries upon four sheets of the abstract, the vendor's solicitor charged 1*l.* 1*s.* for perusing the same, &c., and 4*l.* 6*s.* 8*d.* for a second fair copy of the abstract for the purchaser's solicitor. The Taxing Master disallowed the first item and reduced the second to 13*s.* 4*d.*, which he allowed for

THIS was a suit for the administration of the estate of the testator in the cause, and on the 14th of *March*, 1854, an order was made, directing certain mortgaged premises to be sold; they were accordingly sold on the 23rd of *June* following.

On the 9th of *December*, 1854, an order was made on further directions, referring it to the Taxing Master to tax the Defendant *John Crook Rumsey* (the present Petitioner) his costs, charges and expenses properly incurred in or about the execution of the trusts of the will of the testator, and relating thereto, and his costs of this suit, as between solicitor and client.

In pursuance of this order, the Petitioner's bill of costs, charges and expenses was taxed, and the Taxing Master disallowed the two following items:—

*May* 19th.—Mr. *Waller* having raised certain queries on the title, perusing and considering same, and inspecting several of

recopying the four spoiled sheets of the abstract, to render it fit to be sent to the purchaser's solicitor. On a petition to review, held, that the Taxing Master was right, and that they were matters entirely within the discretion of the Taxing Master.

The solicitor usually charges for drawing the conditions of sale, though they are really drawn by Counsel, and he is thereby remunerated for the trouble of answering Counsel's queries.

A second fair copy of abstract is not allowed, except under special circumstances, as where the notes of counsel render the copy laid before him wholly unfit to go to the purchaser.

|                                                                               | £ | s. | d. | 1855.                   |
|-------------------------------------------------------------------------------|---|----|----|-------------------------|
| of the deeds and drawings, answers thereto and copy . . . . .                 | 1 | 1  | 0  | RUMSEY v. RUMSEY.       |
| Copy abstract of the title for the purchaser's solicitor, 26 sheets . . . . . | 4 | 6  | 8  | <i>Ex parte</i> RUMSEY. |

The Petitioner having objected to the disallowance, the Taxing Master, on reconsideration, disallowed the first item as before, but he only reduced the second item to 13s. 4d., which sum he allowed in respect of four sheets of the copy submitted to Counsel, on which Counsel had written his notes and queries. These four sheets required to be recopied to render the copy abstract submitted to Counsel fit to be sent to the purchaser's solicitor.

The Taxing Master in his certificate stated his reasons for such disallowance and allowance as follows :—

“ No. 1. Mr. Waller is the Conveyancer employed by the Defendant to peruse the title and draw conditions. The solicitor, as is usual, charges for drawing the conditions. I have disallowed this charge, because I consider the solicitor is remunerated for his trouble in answering the queries of his Counsel, by the charge for drawing the conditions.”

“ No. 2. It is not usual to charge for a second fair copy of the abstract for the purchaser, unless under special circumstances, when Counsel have made notes on the copy laid before him, so as to render it unfit to go to the purchaser. For this reason, I have disallowed the second copy charged, except four sheets, on the back of which Mr. Waller seems to have written his opinion.”

A petition was then presented to review the taxation.  
Mr.

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Mr. Waller, in support of the Petitioner.

*The MASTER of the ROLLS* reserved judgment.

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*The MASTER of the ROLLS.*

July 6.

I have ascertained, that according to the old practice it was not customary, except in difficult cases, to send an abstract of title to Counsel to prepare the conditions of sale, before putting the property up to sale by auction; but the solicitor used to draw the conditions of sale, and he was allowed to charge for a draft abstract of title, and one fair copy of it which was delivered to the purchaser; the abstract thus delivered to the purchaser was returned by him, with his queries written upon it; and it was not usual to have two fair copies. Under the Statute for the Improvement of the Jurisdiction of Equity (a), and the General Orders of the Court (b), before a sale by the Court, an abstract of the title is now laid before the Conveyancing Counsel, with a view to the preparation of the conditions of sale. The question raised is this:—Whether a second copy of the abstract to be delivered to the purchaser shall be allowed as a matter of course; and I think it ought not. There may be special circumstances in which a second copy may be allowed, but they do not exist in the present case.

Where some of the sheets of an abstract, which has been laid before Counsel, are rendered useless by remarks written upon it, and new sheets are prepared and substituted in their place, the recopying of such new sheets is allowed, and in this case that allowance has been made. This, however, is not a matter of course, but lies in

(a) 15 & 16 Vict. c. 86, s. 56.

(b) Ord. Can. 534 f.

in the discretion of the Taxing Master; and if sheets are rendered useless, the recopying may, in the discretion of the Taxing Master, be allowed for.

As to the second item, Counsel having raised objections and made sundry queries with reference to the title, the solicitor has charged for perusing the same, inspecting deeds, &c., and copy. The Taxing Master says, that he is remunerated for this by the charge usually made for drawing the conditions of sale, and that it is not a matter of course to allow this charge, for the solicitor is, in fact, relieved from the labour of drawing the conditions of sale by Counsel. This is a matter also in the discretion of the Taxing Master, and is not to be allowed as of course. I think, therefore, that the Taxing Master is right, and the petition must be dismissed without costs.

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SUDLOW v. The DUTCH RHENISH Railway Company.

THE Dutch Rhenish Railway Company was a Dutch company or *société anonyme*, established in 1845, in conformity with the *Netherlands* Code of Commerce, and had for its object the working of a railway between *Amsterdam* and *Arnheim*. The governing body or the "direction" was in *Holland*, as well as the persons composing it, with immaterial exceptions, and there was a secretary and office in *London*, where a copy of the register of shares was kept, which was to be duly posted up by the secretary.

July 19, 20.

Bill by an English shareholder against a Dutch railway company, to be relieved against a forfeiture of shares, dismissed with costs, the undertaking and direction being foreign, and there being a decision in the Dutch Courts opposed to the Plaintiff's view.

The 17th and 13th Articles of the statutes of the company, view.



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company, which was in the form of a decree of the King of the *Netherlands*, were as follows:—

“Art. 17. In case a subscriber or shareholder should make default in paying up one or more of the instalments due within the time specified,” &c., “such shares shall, after public notice being given in the newspapers named in Article 13, and after the delay of a further time of fourteen days, *be forfeited*, with all the instalments already paid thereon, for the benefit of the company, unless the *head direction*, empowered for that purpose by the *general direction*, should think proper to sell such shares, either publicly or privately, at the profit or loss of the person liable, and to sue such person for the eventual deficiency on the whole subscription.”

The 13th Article provided, that the public advertisement was to be “deemed perfectly sufficient and valid, with respect to the shareholders, if inserted in at least three *Netherlands* newspapers, published in the cities of *Amsterdam*, *Rotterdam*, *Utrecht* or *Arnheim*, and in at least two *English* newspapers published in *London*.”

*Sudlow*, the owner of 1,955 shares in the company, had paid the first three deposits. The shares having become greatly depreciated in consequence of the events of 1848, he, with many others, made default in payment of the fourth deposit, and on the 29th of *April*, 1848, a meeting was held of the *general direction*, and such meeting, by a resolution then passed, empowered the *head direction* to sell, agreeably to Article 17 of the Statutes, the shares on which the third and fourth calls had not been paid, at the profit or loss of the shareholders in default, in whose names they were registered, either publicly or privately, and to sue such persons  
 liable

**liable** for the eventual deficiency of the whole subscription of such shares.

It was afterwards discovered that due notices had not been advertised in the newspapers in conformity with the 13th Article, and that, therefore, the resolution was invalid.

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Subsequently, however, notices were duly published in the newspapers of *Holland* and *England*, fixing the 15th of *July*, 1848, as the final period for payment of the calls, and adding that all shares on which the third and fourth calls had not been paid would be irrevocably forfeited. The notice, however, went on to make the following reservation, "the head direction, empowered thereto by the meeting of the general direction, by resolution dated the 29th of *April* of this year, reserving to itself, at the same time, the power of causing those shares in default to be sold, either publicly or privately, for the profit or loss of the persons liable, and to sue the parties liable for the eventual deficiency of the entire subscription."

The call was never paid, and the right to sell reserved by the notice was never exercised. The rules of the company were afterwards altered, and those existing at the date of the forfeiture were incorrectly stated in the bill.

The shares having afterwards become valuable, the representative of *Sudlow*, in 1854, filed this bill against the company, twenty-eight directors, of whom eighteen were resident in the *Netherlands*, and against *Chaplin*, an English director resident there, and *Janson*, the English secretary, resident at the office in *London*, and by whom a copy of the registry of shareholders was kept, in which the transfers and alterations of the shares were recorded. The bill insisted, that the shares had never been

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been duly forfeited, and that they were liable to be sold and not forfeited. It prayed for a declaration, that the directors had no power to deal with *Sudlow's* shares, except by selling them, and for an injunction against cancelling and appropriating the shares for the benefit of the company, and from erasing or transferring the shares from *Sudlow's* name in the *London* register, except upon a sale made for his profit or loss.

An order was made for service of the parties abroad, and a motion to discharge it was, on the 15th of *March*, 1855, refused with costs.

The Defendants proved a judgment, dated the 16th of *March*, 1854, in "The *Provincial* Court of Justice of *North Holland*, in the Chamber of Civil Affairs," in a similar case (a), in which it had been decided, in the Court of "First Instance," and upon appeal, "that the Appellant, not having paid, within the period appointed, the fourth and the following calls which were due, the shares were forfeited to the company, in accordance with the plain letter of the company's statutes for that purpose, *no further special declaration of forfeiture being necessary.*"

Mr. *Cairns* (in the absence of Mr. *R. Palmer*), for the Plaintiff. Under the statutes, the "direction" had the power either of forfeiting the shares and thus releasing the defaulting shareholders, or of selling them at his risk. They have not exercised that option, and cannot treat the shares as forfeited; the shares must either be now sold or the Plaintiff must be allowed to redeem them, upon payment of what is due. The resolution advertised was insufficient, for it did not specify what course the "direction" would take, and it did not say  
that,

(a) *Etches* (an Englishman) v. The *Dutch Rhenish* Company.

**that**, on default in payment, the shares would be forfeited, but that they should be forfeited, and that the **direction** at the same time retained the right to sell **them**, at the risk of the shareholders.

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Mr. Follett and **Mr. Goldsmid**, for the Defendants. **This** is the case of a company, a contract and a railway essentially Dutch. *Holland*, therefore, is the proper *forum* for determining any question between the shareholders, and this Court has no jurisdiction. With the exception of *Chaplin* and of *Janson*, who has limited ministerial duties to perform, all the parties, as well as the subject-matter, are out of the jurisdiction. Test the matter by the converse case; could a Dutch Court assume jurisdiction over the *London and North Western Company*, and adjudicate upon all the conflicting rights of its shareholders? Clearly not.

2. Upon nonpayment of the calls after the advertisements, a forfeiture *ipso facto* took place, and such is the construction of the articles, according to a decree of the Dutch Court, which has been proved in this cause, and this, being a Dutch contract in reference to a Dutch railway, is to be construed according to the law of that country, and governed by the decision of the Courts of *Holland*.

3. This Court has not the means of enforcing its orders on parties not amenable to its jurisdiction. An injunction or a sequestration against the company or the parties resident in *Holland* would be unavailing; *Janson* is here, but this Court would not compel him to commit a breach of duty by making the copy of the registry in *London* differ from the original in *Amsterdam*; even if he did so it would be ineffectual, for the dividends would be paid according to the registry in

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in *Holland*. If the decree asked were made, not only would the Dutch subjects refuse to obey it, but the law of their own country, as declared by their own Courts, forbids them doing so. *Hope v. Hope(a)* was referred to.

The MASTER of the ROLLS rose before the argument for the Defendant had been concluded.

On the following day,

July 20. *The MASTER of the ROLLS* observed,—

Mr. *Palmer*, I feel great difficulty in seeing how the Plaintiff can have any decree in this case. It is a Dutch contract, and it was so opened by Mr. *Cairns*, and Mr. *Follett* informs me, that the Dutch Courts of Justice have given to it a construction opposite to that insisted upon by the Plaintiff. Mr. *Cairns* admits that the Plaintiff can have no decree which will be operative, so far as to enable him to enforce the relief he desires to have, by compelling any payment to the Plaintiff, or the like : and that all he can ask the Court to do is, to make a declaration in favour of the Plaintiff (which, in point of fact, would be opposite to the decision of the Dutch Courts), and then to make a declaration, that the register of shareholders here shall not be varied by the omission of the name of the Plaintiff: although it is admitted, that the register of shareholders here is only a copy of the original register in *Holland*, and that it is the duty of the secretary here to keep the copy conformable with the original register. Now these difficulties

(a) 13 Bm. 237, and 4 Dr G. Mar. & G. 325.

difficulties do appear to me to be so insurmountable that **I should** be glad to hear what you have to say.

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Mr. R. Palmer. After what has fallen from your **Honor**, I do not think I could add anything to what **Mr. Cairns** has said upon that point. I am bound to **say**, that I feel the difficulty the more, in consequence of the recent decision of the House of Lords in the case of **Stainton v. The Carron Company (a)**.

The MASTER of the ROLLS dismissed the bill with **costs**.

(a) 16 *Beav.* 279, reversed by the House of Lords.

ARNOTT v. TYRRELL.

July 19.

UNDER their marriage settlement, Mr. and Mrs. **Arnott** had successive life estates in a trust fund of 10,000*l.* Consols, with power for them to appoint it to their children, and in default, it was to be held in trust for the children equally.

A testator had a power of appointing 10,000*l.* amongst his children, and in default, it was limited to them equally. By his will, he gave his son an annuity, to become void if no appointment should be made of the 10,000*l.* or if any appointment should be made whereby the

There were two children of the marriage, the Plaintiff, a son, and a daughter.

Mr. Arnott, by his will, gave his son an annuity of 100*l.* a year for life, and the testator thereby declared as follows:—"And if no appointment shall be made by myself

son would be benefited. The testator only appointed 5,000*l.* in favour of his daughter, and the son took part of the residue in default of appointment. Held, that the annuity had not ceased.

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myself or my wife under the powers for that purpose contained in our marriage settlement of the sum of 10,000*l.* Three Pounds per Cent. Consolidated Bank Annuities, or if any appointment shall be made thereof, whereby my son *Henry* shall be benefited, then the bequest hereby made to him of the annuity of the sum of 100*l.* shall be void, and the same shall not be paid."

Afterwards, on the marriage of their daughter, Mr. and Mrs. *Arnott*, by deed poll dated the 21st of *April*, 1833, appointed one equal moiety of the 10,000*l.* Consols in favour of the daughter, but they never after made any other appointment.

Mr. *Arnott* survived his wife, and died in *July*, 1845.

The question for the decision of the Court, upon this special case, was, whether, under the circumstances above stated, the declaration contained in the will of Mr. *Arnott* for making void the annuity of 100*l.* thereby given to the Plaintiff had taken effect.

Mr. *R. Palmer* and Mr. *W. D. Evans*, for the Plaintiff. Neither of the events has happened on which the annuity was to cease, for there has been an appointment and the son has not been benefited by it. *Pomfret v. Perring* (a) was cited.

Mr. *Lloyd* and Mr. *Rodwell*, *contrà*. There has not been an appointment of the 10,000*l.*, but merely of the 5,000*l.*, part of it, and the son is benefited in the residue, in consequence of the default in appointing it. [*The Master of the Rolls*.—Suppose he had made an appointment to the daughter of the 10,000*l.* for life, that would be an appointment of the 10,000*l.* : you seek to introduce the

(a) 18 *Beav.* 618.

the word "complete" into the condition. In common parlance, if you were to say, "has the 10,000*l.* been appointed?" the answer would be, "to some extent it **has.**" Both parts of the proviso or declaration must be **looked** at, to arrive at the intention, which was this:—"if my son takes a beneficial interest in the 10,000*l.*, **either** with or without an appointment, his annuity is to **cease.**" If 5,000*l.* had been appointed to him, it would **not** be a complete appointment of the 10,000*l.*, and yet **he** would lose the annuity.

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Mr. R. Palmer was not heard in reply.

The MASTER of the ROLLS.

Different persons would possibly take different views of this case. In common parlance the words "appointment of a fund" would mean any appointment of the sum whether the whole or only a part of it was appointed. If the question were asked, "has any appointment been made?" the answer might be, "yes, in part to *A.*," or "the whole to some person as tenant for life," or the like. In each of those cases there is an appointment, though not of the whole interest in the fund. My view is, that the words of the will are to be so interpreted, in the present case, and this is confirmed by the second part of the clause, "or if any appointment should be made thereof, whereby my said son *Henry* shall be benefited." Suppose an appointment of 5,000*l.* had been made to the son, it would be impossible to say that the son would not have been benefited by it, and it is clear too, that it would not have been an appointment of the whole, but only a partial appointment, and yet it would be such an appointment as the testator had contemplated.

I am further confirmed in this view by a reference to
E 2 the

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the dates. The will and the appointment to the daughter were within a few months of one another; the testator's death appears to have taken place as long as twelve years afterwards. If, therefore, he had meant that his son should not take the 100*l.* a year, nothing would have been easier for him than to have made a codicil; but he did not do so. The reasonable meaning is, that if no appointment should be made of any part of the 10,000*l.*, and if no benefit should be given to the son, then he was to take the annuity.

ORRETT v. CORSER.

CORSER v. ORRETT.

June 20.

July 10, 24.

Where a trustee indebted to the trust becomes bankrupt, it is his duty to prove the debt, and if he neglect so to do, he is liable for the loss, notwithstanding his certificate.

Entry of a payment of a deceased person against his interest, held admissible.

Entry by a deceased person shewing (in contradiction to a deed

evidencing a rightful payment by him) that the payment had been made in breach of trust to *A. B.* instead of to the trustees, held admissible in evidence to shew the receipt by *A. B.*, on the ground that such entry tended to charge the maker of it.

A Plaintiff sued his trustee, to make him responsible for a trust fund which had been wrongfully paid to the Plaintiff's father. The Plaintiff had, as one of the next of kin of his father, received two-thirds of his estate. Held, that the father's assets in the hands of the Plaintiff were primarily liable to make good two-thirds of the trust fund, in exoneration of the trustee.

IN 1796, the testator devised an estate to *George Corser* and two others for a term, upon trust to raise 2,000*l.*, of which 1,000*l.* was to be paid to the testator's daughter *Catherine*, and the remaining 1,000*l.* was to be invested in trust for her for life, with remainder to her children equally. Subject thereto, he devised the estate to *Robert Crockett* in fee.

In 1814, *Catherine* married Mr. *Orret*, and there were issue of the marriage two children, viz., the Plaintiff and his sister.

In 1816, *Robert Crockett* paid the 2,000*l.*, and from the

the result of the evidence it appeared, that the whole of that had been paid over to Mr. *Orrett*. By an indenture, dated in *March*, 1817, reciting that the 2,000*l.* had been paid to the trustees, that 1,000*l.* of it had been paid to Mr. *Orrett*, it was witnessed, that, in consideration of 1,000*l.* paid to the trustees, they assigned the term to a trustee for the owner of the estate, and on the back of the deed was a receipt signed by the trustees.

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In 1828, *George Corser*, the trustee, became bankrupt, and he obtained his certificate in 1829, but no proof was attempted to be made in the bankruptcy for the 1,000*l.* trust money; he died in 1835. The Plaintiff's mother died in 1829, and the Plaintiff attained twenty-one in 1835. In 1843 the Plaintiff's father died intestate, and his residuary estate was divided between his son, (the Plaintiff,) the daughter, and the second wife. The Plaintiff's share was stated to amount to 1,300*l.* The Plaintiff was the administrator of his sister, who was dead.

In *August*, 1854, the Plaintiff, alleging that he first became aware of his rights in 1852, filed his bill against the representatives of *George Corser*, (the trustee,) to recover the 1,000*l.* to which, in his own right and in that of his sister, he claimed to be entitled.

The Defendant *Corser* then filed a cross bill, alleging that the 1,000*l.* had been paid to the Plaintiff's father. In evidence thereof, he produced and duly proved an entry in the account book of *Robert Crockett*, as follows :—

January 17, 1816.

“ Paid Mr. *Orrett*, on my sister *Catherine's* and his own account, according to my father's will, all the interest

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terest due on the 2,000*l*. I am indebted to them up to this day, and also the principal money, (which I have done by the 1,000*l*. left me by my aunt *Lythal*, and out of my Three per Cent. Consols,) 2,000*l*.

"P.S. I have regularly procured the signatures of the parties requisite to the complete discharge of the *Water Eaton* estate from the above sum, for which see the deed."

The cross bill prayed a declaration that the sums received by the Plaintiff from his father's estate ought to be applied in answering any sum which should be found due or payable to him in the suit of *Orrett v. Corser*, or otherwise in respect to the legacy, and that an account should be taken of the moneys received by the Plaintiff from his father's estate. The legal personal representative of the father was not, however, made a party, and on that ground, a demurrer for want of parties was put in and allowed, with leave to amend within a month.

The bill was not amended, and the original cause now came on upon motion for a decree.

Mr. *R. Palmer* and Mr. *W. W. Cooper*, for the Plaintiff, insisted that there being a trust, length of time could be no bar to the Plaintiff's claim, unless it could be shewn that he was fully cognizant of his rights, and took no steps to prosecute them. That the bankruptcy of the trustee was no bar to the Plaintiff's claim, for the certificate, though it might bar the debt, was no protection against the consequences of the subsequent breach of trust, in not proving the debt due from him, as trustee, in the bankruptcy, and recovering the amount for which his estate was liable. That the entry in *Robert Crockett's* account book was not admissible in evidence
to

to prove the payment of the 1,000*l.* to the Plaintiff's father, for it was not an entry of a sum paid *to*, but of a sum paid *by* him, and therefore did not come within the principle of such cases. They cited *Walker v. Symonds* (a); *March v. Russell* (b); *Adams v. Clifton* (c); *Bennett v. Colley* (d); *Burrows v. Walls* (e).

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Mr. Roupell and Mr. Rendall, for the Defendant, contended that though the deed of the 20th of *March*, 1817, on the face of it, stated that the money had been paid to the trustee, without which the estate could not have been released, yet the money was, in fact, paid to the Plaintiff's father, Mr. W. G. Orrett, and this was proved by the entry in *Robert Crockett's* book, which was admissible in evidence; *Short v. Lee* (f); *Walter v. Holman* (g); and that the facts and other evidence were in accordance with this view of the case. They relied on the certificate, the great length of time and laches as a bar.

Mr. W. W. Cooper, in reply.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

July 10.

This is a suit to enforce payment of a legacy given upon certain trusts, by the will of the testator, who died in 1796.

This, therefore, being a clear trust, no time will bar it, although all presumptions that are fair and reasonable

(a) 3 *Swanst.* 64.

(b) 3 *Myl. & Cr.* 31.


(c) 1 *Russ.* 297.

(d) 2 *Myl. & K.* 225; 5 *Sim.* 181.

(e) 5 *De G. M. & G.* 233.

(f) 2 *Jac. & W.* 464.

(g) 4 *Price*, 171.

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able must be made in favour of the Defendant, arising from that circumstance. The Plaintiff attained his age of twenty-one years in 1835, and in 1854, that is upwards of nineteen years afterwards, he filed his bill for the purpose of obtaining payment of this money.

The defences relied on are two. The first is, that the bankruptcy and certificate of the trustee *George Corser* is a bar to any claim of the Plaintiff. Now, I am of opinion that this is no answer to his claim. No doubt the certificate of conformity would bar the right to the original debt due from the trustee, but his duties, character and functions as debtor are perfectly distinct from those which belong to him as trustee; and those of the trustee are not affected by the bankruptcy. It was his duty to prove under the commission, just as much as if he had been a perfect stranger to the commission, and he committed a breach of trust in not doing so. Assuming the matter to rest on this point alone, he is, in my opinion, liable to the amount of dividends which would have been received if he had proved under the commission, and the evidence shews, that if he had done so, he would have received 20s. in the pound. Therefore, in this view of the case, he would be liable for the whole amount. I look at it in this way:—suppose a person, owing money to a trust estate, becomes bankrupt, and the trustee is a distinct and separate person; knowing of the bankruptcy, he is bound to prove the debt, if he does not, he commits a breach of trust, and would be held liable for all that he might have received under the commission, if he had proved the debt as he ought to have done. Is the case altered because the trustee is himself the debtor? I think not. The original debt, no doubt, is barred; but the amount of dividends which the trustee might have received under the commission is a liability subsequently attaching to the trustee

trustee in that character, and is not affected by the bankruptcy or the certificate. On this point, therefore, I am with the Plaintiff.

But the second defence arising from the lapse of time, connected with the facts proved, in my opinion, opens a much more difficult case. The transaction relating to the release of this legacy occurred in *March*, 1817. The Defendant, the son of the trustee, whose estate is sought to be made liable, is personally ignorant of anything relating to this matter; but he tenders certain evidence for the purpose of shewing what occurred, and which he alleges to have been, in substance, to this effect:—The legacy was for the benefit of the wife and children of Mr. *Orrett*, the father of the Plaintiff. The trustee, Mr. *Corser*, considering that Mr. *Orrett* would duly perform the trusts in the manner most beneficial to his wife and children, allowed him to receive the money; which was, in fact, paid to him, although the deed, on the face of it, states it to have been paid to the trustees, without which the land would not have been discharged. This, if proved, is material in this point of view: though it would be no answer to this claim of the Plaintiff, yet it would give the trustee, as against the estate of the father in the hands of the Plaintiff, a right to be repaid the amount of the trust moneys so paid to him.

The only direct evidence I have of the money having been paid to the father is an entry in a private journal kept by *Robert Crockett*, the owner of the estate charged with this legacy, and which estate was released by the deed of 1817, which is in these words—[*His Honor read them*].

It is objected, that this entry is not admissible in evidence for any purpose whatever, and, at all events,
that

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that it is not admissible against the Plaintiff; on this point I reserved my judgment.

The principle which governs the admissibility of such entries is thus stated by Sir *Thomas Plumer* in *Short v. Lee* (a):—"The principle is, that the entry is made by an individual conusant of the fact at a time when it was not in dispute, having no interest to make a false entry, and making one tending to charge himself." The usual instance is an entry by a person of a sum paid to him, as in *Higham v. Ridgeway* (b), which is a leading case upon the subject. In that case the entry was by a medical man of his receipt of his charge for having delivered a woman of a child on a particular day, and that was admitted as evidence of the age of the child. It is contended, that the present memorandum is of no value, because it is the entry of the payment and not of the receipt of money by the person who made it, and therefore, as it tends to discharge himself, it is inadmissible. I am, however, disposed to consider the entry as admissible, on the ground that it does not discharge the person who made it, but, on the contrary, is an admission against his own interest. The payment of the 1,000*l.* to Mr. *Orrett* was no discharge to *Robert Crockett* of his liability to pay the legacy of 1,000*l.*, because a payment to the wrong person would not discharge his estate from the 1,000*l.* due to the trustees. The way in which I look at it is this:—the admissibility of this evidence cannot, I think, depend on the existence or non-existence of the deed of *March*, 1817, or whether his estate is or is not discharged from that legacy. Suppose that, notwithstanding the deed and immediately on the execution of it the trustees had filed a bill to compel *Robert Crockett* to pay the 1,000*l.*, alleging

(a) 2 *Juc. & W.* p. 475.(b) 10 *East*, 109.

alleging evidence that *Robert Crockett* had not paid them the money though he had promised to do so, but had paid it to another person who was not an agent of the trustee. If, in answer to such claim, Mr. *Crockett* simply alleged that he had paid the trustees, this entry in his own book would be admissible to shew that he had paid Mr. *Orrett* and not the trustee, and therefore had not discharged his liability. If admissible in such a case, why is it not admissible here? After much hesitation and much consideration, I am of opinion that this entry is admissible in evidence between the parties to shew that the second 1,000*l.* was paid to Mr. *Orrett* and not to the trustees, to whom it ought to have been paid. If this evidence is to be relied upon as conclusive, then would arise the question whether the trustee authorized such payment, but this latter question, after this lapse of time, could not, in my opinion, arise under the circumstances of this case. Before however the Court will act upon this evidence it is necessary to consider the surrounding circumstances, and see whether they corroborate or invalidate it. [*The Master of the Rolls examined the subsequent facts, and came to the conclusion that they confirmed the entry.*]

In this state of things, (presuming everything I legally can most favourable to the Defendant,) I am of opinion that the Defendant is bound to make good the legacy to the Plaintiff, but that he is entitled to make the assets of the father in the hands of the Plaintiff available for the purpose of repaying the Defendant what is due to him.

I had sketched the form of the decree upon the assumption that the legal personal representative of Mr. *Orrett* was before the Court; but as that is not the case, I cannot make the decree I intended. But there being

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1855. being evidence before the Court that the Plaintiff has in his hands assets of his father, I will not allow him to receive anything, without giving the Defendant an opportunity of instituting proper proceedings for making those assets available for the purpose of relieving the Defendant from his liability. If the Plaintiff declines that, the bill will be dismissed without costs.

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Mr. *R. Palmer* then argued, that the share of the residuary estate of the Plaintiff's father received by him and his sister was only liable to two-thirds of the 1,000*l.*, and that the share of the widow ought to bear its one-third proportion; *Gillespie v. Alexander (a)*.

Mr. *Roupell*, on the other hand, contended that the 1,000*l.* having been received by the Plaintiff's father, every portion of his assets was liable to make it good.

July 24. *The MASTER of the ROLLS.*

I have looked at this case, and I am of opinion the proper course to be taken, consistently with the view that I have expressed of this case, is this:—I must treat two-thirds of the debt as received by the Plaintiff at the death of his father, and the one-third as not received by him and as due from the trustee, and that consequently one-third of 1,000*l.*, which will be 333*l.* 6*s.* 8*d.*, will be due from the Defendant out of the estate of his father to the Plaintiff, with interest upon it from the death of the Plaintiff's father at the rate of 4*l.* per cent. per annum. I shall give no costs of the suit. In my opinion, the Plaintiff asked more than he was entitled to, and the case is a very hard one upon the Defendant even as it stands. The Defendant will either admit having received assets of his testator sufficient to answer the demand made, or there must be an account taken.

(a) 3 *Russell*, 130.

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PROLE v. MASTERMAN.

July 24.

THE *Cambrian and Grand Junction Railway Company* was provisionally registered in *September, 1845*, and a managing committee was appointed, consisting of the Plaintiff, some of the Defendants, and others. The project did not succeed, and at a meeting of the shareholders, on the 12th *October, 1846*, it was resolved that the company should be dissolved; and soon after, at a meeting of the committee of management, a resolution was passed appointing *Charles Robert Colman* and *John Lawrie* a sub-committee, to settle and wind up the affairs of the company, and they accepted and acted on the appointment. But in *December, 1846*, some of the shareholders being dissatisfied with the mode in which the business of the company had been conducted, a bill was filed by *John Franks* and others on behalf of themselves and all the other shareholders of the company (except the then Defendants) against the members of the committee of management, alleging acts of fraudulent mismanagement on their part, by the secret reservation to themselves of shares without making the due payments and by the misapplication of the funds of the company, by what is shortly expressed by the term "rigging the market." To recover these the bill was filed.

A suit was instituted against the directors of an abortive company, to make them liable for acts of mismanagement and for the misapplication of its funds. This was compromised by an order on the Defendants to pay a fixed sum. One of them having paid more than his share, Held, that he could sustain a suit simply for contribution in respect of the compromise, and that the co-directors were not entitled, without a cross bill, to make the Plaintiff, at the same time, account for his general liabilities to the company.

The suit, however, was compromised, and by an order of the 2nd of *August, 1849*, the Defendants (including the present Plaintiff) were ordered to pay to the Plaintiffs and to the other holders of the 1,840 shares

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shares thereafter mentioned the sum of 1,000*l.* on the 12th of *August* then next, and the further sum of 868*l.* on the 2nd of *February*, 1850, in satisfaction of all claims and demands in respect of such shares. To make provision for satisfying the amount to be paid under this order, Messrs. *Colman* and *Lawrie* were again appointed (the Plaintiff being a party to the appointment) a sub-committee, to collect contributions and make arrangements with the several parties liable under the order to pay that amount. It was alleged, that the members of the committee, with the exception of Plaintiff, had advanced large sums on account of the general liabilities of the concern, and on that account it was understood, that regard was to be had to that circumstance, and that the Plaintiff should pay more towards the satisfaction of the 1,868*l.* than the others. The result, however, was, that he was obliged, by legal process, to pay a much larger share than the others, and he now filed his bill for an account and for a contribution by the others to recoup him the sums alleged to be overpaid above his fair proportion. By his bill he alleged, that Messrs. *Colman* and *Lawrie* had agreed to take 400*l.* as his share, to be secured by two bills of exchange and a deposit of dock warrants for certain wines, and that they were to give him an indemnity from all further liability under this order; but that he had been obliged to pay 847*l.* 5*s.* 11*d.* and got no indemnity, thus leaving a very small amount to be paid by each of the other members of the committee. *Colman* (*Lawrie* being dead) absolutely denied any such agreement, though he admitted the bills had been taken and the deposit of the wine warrants accepted, but it was because they could get nothing else from the Plaintiff. He said, that the money so paid by the Plaintiff, as he alleged, was not wholly in respect of his contribution, but much of it was

was paid in consequence of the compulsory process adopted to make him pay, and the costs he had been put to by his neglect or refusal to pay his proper *quota*.

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Mr. *R. Palmer* and Mr. *Bird*, for the Plaintiff, contended that he was entitled to a contribution in respect of this particular matter without reference to any other transaction.

Mr. *Lloyd*, Mr. *Surrage*, Mr. *Roupell*, Mr. *Waller*, Mr. *Follett*, Mr. *H. Morris* and Mr. *Hardy*, for the different Defendants, argued that this suit could not be sustained in its present form, and that it must either be dismissed or accounts directed, so as to ascertain the complete rights of the parties. They contended, that though the Plaintiff might have paid more than his share of the 1,868*l.* ordered to be paid upon the compromise, yet that he was a defaulter in respect of the general liabilities of the company, and that he was not entitled to a contribution from the Defendants, without himself making good what might be due from him as a shareholder and director of the company, and, consequently, that the accounts must therefore include these matters; *Hanson v. Keating* (a); *Gibson v. Goldmid* (b); *Rawson v. Samuel* (c).

The MASTER of the ROLLS.

I do not think the Court, on this occasion, has jurisdiction to direct the expensive inquiries or accounts which have been insisted on by the Defendants.

The view which I take of the case is shortly this:
the

(a) 4 *Hare*, 1.

the Lords Justices.

(b) 18 *Beav.* 584, reversed by

(c) *Craig & Ph.* 161.

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the facts may be thus stated:—certain members of a partnership file a bill against other members, who fill the character of managing committee, alleging acts of misconduct and seeking to make them personally liable to pay a large sum of money. The Defendants to that suit compromise and agree to pay 1,868*l.* to the Plaintiff and the other members, in order to put an end to the litigation. The present Plaintiff, being one of the Defendants to the former suit, has paid 847*l.*, which is more than his share of the 1,868*l.*, and he files the present bill for contribution. The answer is, “You are not entitled to any contribution from us, until you have wound up the affairs of the partnership, and ascertained the rights and liabilities of all the parties, and paid your share.” This, however, is properly the subject of a distinct suit, and it involves different rights, and requires different parties to it. It might as well be said, that if there happened to be very many other transactions between these parties, the Plaintiff could not come to settle one without at the same time settling all the others. The Defendants must file a cross bill to take the accounts of the partnership, making all persons interested parties, in order that their rights and liabilities may be ascertained. They may then insist that they are not bound to make good the amount of their contribution in respect of the 1,868*l.*, until Plaintiff has made good to them what is due on the other matters. That, however, would be a separate matter, and to obtain such relief a cross bill must be filed. In such a case, I should be disposed to say, that the Plaintiff could not get what is due to him on the one account, without making good to the partnership what is due from him.

In the absence of such cross suit, I cannot, however, take these accounts or enter into these matters.

I am

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5*l.* 5*s.* *per diem*, and no more, ought to be allowed to special Examiner (a).

I am of opinion that the length of the meeting cannot affect the amount of the fee; the special Examiner is bound to give the whole of a legal day for the purpose. I also think that no fee ought to be allowed for reading the papers. This is what ought to be allowed at present, but it is probable that some General Order will be made in *Michaelmas* Term which will regulate the matter. In the mean time, as I must dispose of the case, and I think the special Examiner ought to receive from the solicitor so much as, together with what he has already received, will make up five guineas a day together with the fees to his clerk, which I presume to be 5*s.* a day.

The solicitor must personally undertake to pay what, if anything, shall be further allowed under any General Order of the Court.

Having stated my opinion, it will be better not to draw up any order on the subject.

(a) *Ordines Cam.* 329.

1855.

In re BRIGHT'S TRUST.

June 11, 12,
21.

THE testator by his will, dated in 1829, bequeathed his personal estate to three trustees, upon trust to convert and invest, and pay the income to his daughter *Mary Bright* for life, and after her decease, he directed his trustees, out of the trust funds, to pay the sum of 3,000*l.* unto each of his granddaughters *Jesse* and *Rose*, for their own absolute use and benefit respectively; and if either of his said granddaughters should be dead at such the time of the decease of *Mary Bright*, then he directed that the sum of 3,000*l.* thereby given to such granddaughter should go and be paid to his granddaughter who should be then living, for her own absolute use and benefit, to whom, in that event, he gave and bequeathed the same accordingly. Provided always, and he thereby declared, that in case either of his said granddaughters, so dying as aforesaid, should have been married, and should have left any child or children her surviving, then that the trustees should stand possessed of the said sum of 3,000*l.* thereinbefore bequeathed to his, her or their said mother, upon trust "for all such children."

Bequest of residue to *A.* for life, and, after her decease, a gift of 3,000*l.* each to *B.* and *C.* (granddaughters), for their absolute use; and if either of them should be dead at the decease of *A.*, her 3,000*l.* was to go to the granddaughter who should be then living; but in case such granddaughter should have left children, they were to take her legacy. *B.* died first, leaving children; *C.* then died without issue, leaving *A.* surviving. On the death of *A.*: Held, that *C.*'s legacy was vested and passed to her representatives.

And after payment of the two legacies of 3,000*l.* and 3,000*l.*, the testator gave the stocks, &c. on which the residue should be invested to his daughter-in-law *Jean*, and his three grandsons, equally, with benefit of survivorship, if either of them died in the lifetime of *Mary Bright*, but if any grandson so dying left children, they were to take their parent's share.

And he directed, that if all his said grandchildren and

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the said *Jean Bright* should die in the lifetime of his daughter *Mary Bright*, and his grandchildren without leaving issue as aforesaid, then all his trust moneys, &c. should be in trust for his daughter *Mary Bright*.

The testator died in 1831; *Jesse* died in 1844, leaving three children; *Rose* died in 1847, without issue, and *Mary Bright* died in 1854.

The legacy of 3,000*l.* bequeathed to *Rose* was claimed, first, by her administrator; secondly, by the residuary legatees; and, thirdly, by the next of kin of the testator. The question was discussed upon petition presented for payment of the fund out of Court.

Mr. *Roupell* and Mr. *C. C. Barber*, for the residuary legatees, contended, that as the legacies did not exist till the time of raising them arrived, and as the granddaughters of the testator died in the lifetime of *Mary Bright*, that time never arrived; consequently the legacies never became raisable or payable, but sunk into the residue. And at all events, that *Rose* having died without issue before the time the legacy became raisable, it never took effect, but remained part of the residue. They cited *Beck v. Burn* (a).

Mr. *Lloyd*, in the same interest, also contended, that there was no gift to the granddaughters until after the death of *Mary Bright*, and that the intention was, that the legatees should take nothing unless they both survived the tenant for life. He cited *Pope v. Whitcombe* (b).

Mr. *R. Palmer* and Mr. *Kenyon*, for the next of kin of the testator.

The

(a) 7 *Beav.* 492.

(b) 3 *Russ.* 124.

The MASTER of the ROLLS intimated that he had no doubt that the next of kin were not entitled.

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Mr. C. Hall, Mr. H. Stevens, Mr. Williamson and Mr. W. H. Clarke, for other parties.

Mr. Follett and Mr. Prendergast, for the administrator of *Rose*, contended that the legacy to *Rose* was an absolute vested interest in the first instance, but liable to be divested in a particular event, viz. on her death in the lifetime of *Jesse* and *Mary Bright*. That this had not happened, as she survived the former, and that notwithstanding her death in the lifetime of *Mary Bright*, the gift was an absolutely vested and transmissible interest, and passed to her legal personal representative; *Harrison v. Foreman* (a); *Benyon v. Maddison* (b); *Smither v. Willock* (c); *Whittell v. Dudin* (d); 1 *Rep. Leg.* (e).

Mr. Bagshawe and Mr. Bristowe, in the same interest, cited *Browne v. Lord Kenyon* (f); *Sturgess v. Pearson* (g); *Ring v. Hardwick* (h).

Mr. C. C. Barber, in reply.

The MASTER of the ROLLS.

My present impression is, that the legacy to *Rose* was an interest vested in her at the death of the testator, but I will consider the point.

The

(a) 5 *Ves.* 207.

(b) 2 *Bro. C. C.* 75.

(c) 9 *Ves.* 233.

(d) 2 *Jac. & W.* 279.

(e) Page 624 (4th edit.)

(f) 3 *Madd.* 410.

(g) 4 *Madd.* 411.

(h) 2 *Beav.* 352.

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June 12.

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I have looked at the cases and I am confirmed in my opinion, that this is a vested legacy.

Where payment is postponed for the convenience of the estate, as where an estate is given to one for life, with remainder to another in fee, charged with the payment of legacies to other persons, on the death of the tenant for life, the legacies are vested on the death of the testator, although the payment is postponed. I am confirmed in my first impression, that the legacy of 3,000*l.* is vested in *Rose*, and the fact of there being a contingent gift over of the whole residue, which might have arisen in case of all the grandchildren dying before the death of the tenant for life, does not, in my opinion, vary the case. The authorities are numerous that such a gift over does not make a legacy contingent, although it may have an influence on the Court in putting a construction on the dispositions of the will.

The result is, that the legacy is vested. I will make a declaration to that effect, and the proper order consequential upon it.

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ARMSTRONG v. ARMSTRONG. (No. 1.)

THOMAS ARMSTRONG and the Defendant *William Richardson* were joint owners of a ship called "*The Amethyst*," the former being entitled to twenty-one sixty-fourths, and the latter to the remaining shares.

In August, 1851, "*The Amethyst*" foundered at sea, and a sum of 1,230*l.* became payable to the owners, in the proportion of their respective shares, for insurance on the ship and freight. It was then arranged between them that another ship should be purchased, in which they should be interested in the same proportions, and that the insurance money should be applied in part payment of the purchase-money. Accordingly, on the 13th of September, 1851, an agreement was entered into for the purchase of a newly-built ship, called "*The William Richardson*," at the price of 2,500*l.*, the balance whereof, beyond the insurance money, together with some additional outlay, was paid or secured by *Richardson*, who it was understood (as alleged by the Plaintiffs) was to retain the profits on *Thomas Armstrong's* shares, in liquidation of the remaining part of his proportion of the purchase-money, as he had previously done in the case of "*The Amethyst*."

August 3. Between the date of a bill of sale of shares of a ship and the entry of the transfer on the register, the purchaser had notice that the vendor, though the shares were registered in his name, was a trustee. The case presenting a *prima facie* appearance of fraud, the Court granted an interim injunction to restrain the purchaser from dealing with the shares or indorsing the transfer on the certificate of registry, so as to insure the effective determination of the questions at the hearing.

The agreement for purchase and the receipt for the deposit were both in the names of *William Richardson* and *Thomas Armstrong*, but all matters connected with the agreement and purchase were managed by *Richardson* and the Defendant *Thomas Cassop Armstrong*

1854. *strong* (the eldest son of *Thomas Armstrong*), who, as the Plaintiffs alleged, acted as the agent of his father.

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On the 8th of *October*, 1851, "*The William Richardson*" was registered in the names of *William Richardson* and *Thomas Cassop Armstrong*, as the owners, in the proportions of forty-three to twenty-one shares.

The ship soon after set sail for *Alexandria*, *Thomas Cassop Armstrong* being the master, as he had previously been of "*The Amethyst*." After her departure, and on the 20th of *October*, 1852, *Thomas Armstrong* died, having by his will given his whole personal estate equally to the Defendant *Thomas Cassop Armstrong* and his other children. The Plaintiffs took out letters of administration to their father's estate, and having discovered that the twenty-one sixty-fourth shares were registered in the name of the Defendant *Thomas Cassop Armstrong*, and that by a bill of sale, dated the 27th of *November*, 1852, he had transferred five of the shares to *Richardson*, communications took place between the parties, in the course of which, *Thomas Cassop Armstrong* admitted that the twenty-one sixty-fourths were the property of his father, and alleged that the five shares had been transferred by him, in discharge of the balance due on his proportion of the purchase-money not already paid out of the profits.

Thereupon, and upon the representation of the Defendant *Thomas Cassop Armstrong* that a sale of the shares would deprive him of the command of the ship, the Defendant *Thomas Cassop Armstrong* signed a memorandum of agreement, dated the 8th of *March*, 1853, whereby, after reciting that the insurance money was the property of *Thomas Armstrong*, that sixteen sixty-fourth

fourth shares of "*The William Richardson*" were registered in the name of *Thomas Cassop Armstrong*, as trustee for *Thomas Armstrong*, and that the Plaintiffs had agreed to allow *Thomas Cassop Armstrong* "to navigate the said shares in the said ship for twelve months," *Thomas Cassop Armstrong* agreed to account to the Plaintiffs, as administrators of *Thomas Armstrong*, for the profits of the ship, from the time she was purchased with the insurance money of *Thomas Armstrong*, and at the expiration of that period to sell the shares and pay over the proceeds thereof, to be divided according to the will of *Thomas Armstrong*, one-fourth to *Thomas Cassop Armstrong*, and the remainder to the Plaintiffs and the representatives of a deceased son.

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No account of profits was rendered by *Thomas Cassop Armstrong*, nor would he, on being applied to in pursuance of the agreement, concur in a sale, and on the 22nd of June, 1854, the solicitors of the Plaintiffs gave notice to the Defendant *Richardson* and his solicitors of the Plaintiffs' title, as administrators, to the twenty-one sixty-fourths, and demanding an account of the profits and a statement of the consideration for the five shares transferred to *Richardson*. The solicitors of *Richardson* disclaimed all liability to account, as required, but made an offer, without prejudice, to compromise.

On the 30th of June, 1854, the Plaintiffs found, by examining the Custom-house books, that the Defendant *Thomas Cassop Armstrong* had, by a bill of sale, dated the 8th of the same month, transferred the remaining sixteen sixty-fourths to the Defendant *Richardson*, but they alleged that the bill of sale was not entered till the same 30th of June, or at all events till after the notice of the 22nd of June, and this was not denied.

The

1854. The ship had sailed on the 28th of *June*. The Plaintiffs by this bill prayed an account of profits, a transfer to the administrators of *Thomas Armstrong* or a sale, and an injunction to restrain the Defendants from selling or transferring the twenty-one sixty-fourths, and from parting with the certificate of registry, and from causing any entry of sale to be made in the registry book, or any indorsement thereof on the certificate.

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The Defendant *Thomas Cassop Armstrong* being on a voyage, the Plaintiffs moved for an injunction in the terms of the prayer, as against the Defendant *Richardson*.

The Defendant *Richardson* by his affidavit stated, that from a conversation he had with *Thomas Armstrong*, he believed he had given the Defendant *Thomas Cassop Armstrong* the insurance money, and he had therefore always treated him, and not his father, as the real owner, after his last account in respect of "*The Amethyst*;" that all the accounts as to "*The William Richardson*," both before and after the death of *Thomas Armstrong*, had been settled by him with the Defendant *Thomas Cassop Armstrong*; that he had never been asked either by *Thomas Armstrong* or the Plaintiffs to account till the letter of the 22nd of *June*, 1854; that on being then informed by the Defendant *Thomas Cassop Armstrong* of the claims made against him by the Plaintiffs, which he foresaw might interfere with the working of the ship, he procured the bill of sale of the 8th of *June*, 1854, but in ignorance of the memorandum of the agreement of the 8th of *March*, 1853 and of the letter of the 22nd of *June*, 1854; that the consideration of the bill of sale was the fair value, as was also the consideration for the five sixty-fourth shares, and that the agreement for the purchase of "*The William Richardson*"

ardson" and the receipt for deposit were, by mistake, in the name of *Thomas Armstrong*, instead of the Defendant *Thomas Cassop Armstrong*.

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The Plaintiffs by their affidavits denied the alleged conversation between the Defendant *Richardson* and *Thomas Armstrong*, and stated that *Thomas Armstrong* became interested in both ships to give employment to his son; that the accounts as to "*The Amethyst*" were all settled by the Plaintiff *James Armstrong* (who acted for his father, an infirm old man), with the son of the Defendant *Richardson*, and sometimes, but not often, with *Thomas Cassop Armstrong* himself, but never with the Defendant *Richardson*; that the sums due for profits were, from time to time, paid over to *Thomas Armstrong*, the account being signed by the Plaintiff *James Armstrong*, and that *Thomas Armstrong* requested applications to be made to the Defendant *Richardson* for an account of profits of the new ship, but no application had been made, because it was supposed that the balance due for purchase-money had not been fully liquidated.

Mr. *R. Palmer* and Mr. *Thomas Stevens*, in support of the motion, contended, that the registration of the shares in the name of *Thomas Cassop Armstrong* was fraudulent, he being the mere agent and trustee of his father, who supposed they had been registered in his own name, and that the Court ought therefore to prevent the legal title in *Richardson* being perfected, by the indorsement of the transfer on the certificate, after the return of the ship. They cited *Mestaer v. Gillespie* (a); *Speldt v. Lechmere* (b); *Ex parte Yallop* (c).

Mr.

(a) 11 Ves. 621. (b) 13 Ves. 588. (c) 15 Ves. 60.

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Mr. Roupell and Mr. W. Forster, for the Defendant Richardson. There has been no fraud. [*The Master of the Rolls*. I am satisfied as to the fairness of the transaction, so far as relates to the five sixty-fourths. And if there be no fraud, the Court will not interfere; *Langton v. Horton* (a). Even where fraud exists, it must be very clear to induce the Court to interfere, and in some instances it has refused to do so, it being against the general policy of the Registry Acts, which it is so important to enforce; *Ex parte Yallop* (b); and the application of equitable doctrines is excluded by the 8 & 9 Vict. c. 89, s. 38. The registry of a bill of sale renders the transfer perfect and complete, the indorsement of the transfer on the bill of sale being, by section 38 of the same statute, only a ministerial act of the Custom-house officer.

Mr. R. Palmer, was not heard in reply.

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In my opinion, this is a case for restraining the transfer of the sixteen shares of "The *William Richardson*." I agree that the register is decisive, but there are cases in which parties privy to fraud are restrained from exercising the rights to which they are *prima facie* entitled. There are various cases where a fraud has been committed, in which the Court will not interfere against an innocent person, as, for instance, against a purchaser for valuable consideration without notice. Consider this case then, first, as regards *Thomas Cassop Armstrong*, who is out of the jurisdiction and cannot be dealt with except to the extent of his admissions: *Thomas Armstrong* became owner of the ship *Ame-
thyst*

(a) 5 Beav. 9.

(b) 15 Ves. 60.

thyst to give employment to his son, and, up to the period of her loss, the son accounted for the freight. Then the share of *Thomas Armstrong* in the insurance money is agreed to be laid out in the purchase of a new ship, and the sum of 2,500*l.* is to be given to a ship-builder for "*The William Richardson*," which price is accordingly paid. The contract is nominally entered into between *Thomas Armstrong* and *William Richardson* of the one part, and the builder of the other part, but the ship is registered, as to forty-three shares, in the name of *William Richardson*, and as to twenty-one shares in the name of *Thomas Cassop Armstrong*. Now *Thomas Cassop Armstrong* admits he had no authority to register the shares in his own name, that in fact he was not the owner of the twenty-one shares, that he was liable to account for them, and intended so to do, and that his reason for registering them in his own name was, to have the control of the ship arising from ownership. If the matter stood there, *Thomas Armstrong* would be the owner, and *Thomas Cassop Armstrong*, having registered them in his own name, could not claim them for his own property, but if *William Richardson* had purchased them for value he would be entitled, if he had no notice of the fact that *Thomas Cassop Armstrong's* right to them could be impeached; but the opposite is proved by the evidence of *William Richardson* himself, for he knew that the father gave the son no authority, and that there existed a document to the contrary, shewing an express agreement entered into as to the sale and distribution of the proceeds of the shares; yet *Richardson*, knowing this, takes a bill of sale for the transfer of the sixteen shares to himself for no consideration. The sale is therefore not *bonâ fide*, and *William Richardson* had distinct notice, that though *Thomas Cassop Armstrong* was the legal owner on the register, he had, in truth, no title to the

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1854. the shares. There must, therefore, be an injunction as to the sixteen shares, in order that matters may continue in the present state until the hearing of the cause.

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June 7, 8, 21.

The policy of the Ship Registry Act, in disregarding interests not appearing on the register, is inapplicable both to the money arising from the sale of a ship and to the produce of the freight.

Where a party who appears on the registry to be the absolute owner of a ship, enters into an agreement for valuable consideration, admitting he is a trustee, and engaging to sell the ship and hand over the produce to the true owner, the Court, notwithstanding the Ship Registry Act, will enforce the agreement.

THIS case is reported, *ante*, p. 71, on the occasion of its coming before the Court upon a motion for an injunction.

The cause now came on upon motion for a decree, when the facts were somewhat varied. The Defendant *Richardson*, by his answer, stated, that the sixteen shares of the ship "*William Richardson*," the subject of dispute between the Plaintiffs and the Defendant *Thomas Cassop Armstrong*, had been *bonâ fide* sold to him for 700*l.*, and he admitted that he was accountable for that sum, as well as for 215*l.* 19*s.* 0*d.*, in respect of the corresponding proportion of the ship's freight, to the persons who should be duly found entitled thereto. The Plaintiffs thereupon adopted the sale, and sought relief only in respect of those moneys, and relinquished all claim to the specific shares themselves. They claimed, however, to participate in the moneys as forming

Shares in a ship purchased with *A.*'s money were registered in *B.*'s name. After *A.*'s death, *B.* entered into an agreement with his representatives, admitting their right and for valuable consideration agreeing to sell the shares at the end of twelve months, and to account to the representatives for the proceeds. *B.* accordingly sold to *C.* Held, that though the Ship Registry Act prevented the representatives enforcing any right against the ship itself, still that they were entitled to recover the purchase-money in the hands of *C.*

ng part of the assets of the testator *Thomas Armstrong's* estate, and they insisted that the Defendant *Thomas Cassop Armstrong* was a mere trustee for hem and himself, under and by virtue of a memorandum of agreement, bearing date the 8th of *March*, 1853, and made between *Thomas Cassop Armstrong* and *James Armstrong* and *Ann Hutchinson*, wife of *John Hutchinson* of *Sunderland*, master mariner, the administrators, with the will annexed of *Thomas Armstrong*, late of *Sunderland*, aforesaid, grocer, deceased, as follows:—"Whereas *Thomas Armstrong*, during his life, was possessed of a certain sum of money arising from the insurance received from the loss of the ship '*Amethyst*,' which was invested in the ship '*William Richardson*,' of *Sunderland*, and the sixteen sixty-fourth shares thereof were registered in the name of the said *Thomas Cassop Armstrong*, as trustee for and on behalf of the said *Thomas Armstrong*, deceased; and whereas the said *James Armstrong* and *Ann Hutchinson* have agreed to allow the said *Thomas Cassop Armstrong* to navigate the said shares in the said ship '*William Richardson*' for twelve months from this time, and, in consideration thereof, the said *Thomas Cassop Armstrong* hereby agrees to account to the said *James Armstrong* and *Ann Hutchinson*, as such administrators of the said *Thomas Armstrong*, for the gains and profits of the said ship, from the time she was purchased with the money of the said *Thomas Armstrong*, as aforesaid, and at the expiration of the said period, to sell the same shares, and to pay over the proceeds thereof, to be divided according to the will of the said *Thomas Armstrong*, deceased, namely, one-fourth to the said *Thomas Cassop Armstrong*, and the remainder to the representatives of *Matthew Armstrong*, deceased, and the said *James Armstrong* and the said *Ann Hutchinson*."

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This agreement was signed by the three persons parties thereto.

The Plaintiffs claimed, under the will of *Thomas Armstrong* and this agreement, to be entitled to a share of the proceeds of the sale and of the freight, which they insisted did not come within the provisions of the Ship Registry Acts, as an interest in the ship itself.

Mr. *R. Palmer* and Mr. *Thomas Stevens*, for the Plaintiff. The only question is, whether this money does or not form part of the assets of *Thomas Armstrong*, the testator, which the Plaintiffs, his legal personal representatives, are entitled to sue for and recover. Here is an agreement in writing between the parties whereby, after expressly reciting that the shares were registered in the name of *Thomas Cassop Armstrong* as a trustee for *Thomas Armstrong*, *Thomas Cassop Armstrong* agrees to account for the gains and profits of the ship, and for the proceeds of the sale of the shares, in consideration of his being permitted to navigate the ship for a certain length of time. That is an agreement wholly independent of the Ship Registry Acts and the policy of the Navigation Laws, and the Ship Registry Acts can in no way affect such an agreement. It relates not to the ship, but to the proceeds of the sale of the ship, and is valid even though the agreement might be inoperative as regards the ship itself. They cited *Mestaen v. Gillespie* (a); *Ex parte Yallop* (b); *Speldt v. Lockmere* (c); *Davenport v. Whitmore* (d); *Ladbroke v. Lee* (e); *Prouting v. Hammond* (f); *Battersby v. Smyth* (g); *Burn v. Carvalho* (h); *Reid v. Fairbanks* (i).

Mr.

(a) 11 *Fes.* 621.(b) 13 *Fes.* 60.(c) 13 *Fes.* 588.(d) 2 *Myl. & Cr.* 177.(e) 4 *De G. & Sm.* 106.(f) 5 *Tennt.* 688.(g) 3 *Mabine*, 110.(h) 4 *Myl. & Cr.* 690.(i) 13 *Com. B. Rep.* 692.

Mr. Roupell and **Mr. W. Forster**, for the Defendants, contended, that the agreement amounted to an equitable contract for the sale of the ship and distribution of the proceeds, which, under the provisions of the Ship Registry Act, was void. They cited *Thompson v. Leake* (a); *Newnham v. Graves* (b); *Barker v. Chapman* (c); *Battersby v. Smyth* (d); *Follett v. Delany* (e); *Hughes v. Morris* (f); *M'Calmont v. Rankin* (g); *Duncan v. Tindall* (h); *Brewster v. Clarke* (i); 8 & 9 Vict. c. 89, ss. 34—39.

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The MASTER of the ROLLS.

June 21.

The nature of the case is this:—*Thomas Armstrong*, the testator, was part owner of a vessel called “*The Amethyst*,” which was lost. He received his share of the insurance money, but before this had been done he was desirous to embark with his joint owner, the Defendant *Mr. Richardson*, in a new adventure in another ship, to be called “*The William Richardson*,” in which he was to have twenty-one sixty-fourths. His object undoubtedly was to employ his son *Thomas Cassop Armstrong*, as master of the ship. *Thomas Cassop Armstrong* acted as his father's agent in the matter, and 400*l.*, received by *Thomas Armstrong* in respect of the insurance money, was applied in part payment of his share in the new ship, and the remainder of his share of the purchase-money was to be paid out of the ship's earnings. *Thomas Cassop Armstrong* registered his father's shares of the ship in his own name as owner thereof. There is

(a) 1 *Madd.* 39.

(b) 1 *Madd.* 399, n.

(c) 1 *Madd.* 400, n.

(d) 3 *Madd.* 110.

(e) 2 *De G. & Sm.* 235.

(f) 2 *De G. M. & G.* 349.

(g) 8 *Hare*, 1; 2 *De G., M. & G.* 403.

(h) 13 *C. B. Rep.* 258.

(i) 2 *Mer.* 75.

1855. is some contest upon the evidence, whether that was
done with the consent and assent of his father or not,
ARMSTRONG v. ARMSTRONG. but in the view that I am about to state of the case, I
do not think it material.

In October, 1852, *Thomas Armstrong*, the father, died, having by his will given his property equally among all his children; and in November following, *Thomas Cassop Armstrong*, in order to repay a portion of the debt remaining due for the ship, transferred five of twenty-one sixty-fourths to *William Richardson*, in part discharge of that debt, which is not complained of. There then remained sixteen sixty-fourths standing in the name of *Thomas Cassop Armstrong*, and these form the subject of the present suit. The Plaintiffs applied to *Thomas Cassop Armstrong*, and they stated that the one-fourth of the ship belonged to the testator, having been bought with his money, and that he ought therefore to account for it, and make it good to the testator's estate. Thereupon a considerable number of letters passed between the parties upon this subject, and some of them are very material. One was written from *Cardiff*, upon his return from a voyage, in which he expressly states, that it is desirable not to transfer the ship into the names of these additional persons, but to make an arrangement by which they can have the benefit of the ship, impliedly therefore admitting and in fact he nowhere disputes the claim made by his brother and sister; and in all his letters, and evidently understanding the whole matter, he speaks distinctly and plainly on the subject, as to the course he is disposed to adopt. Thereupon, after his return and subsequently to these letters, he enters into an agreement which forms the groundwork of the decree, which I think the Plaintiffs are entitled to. I refer to the letters because they establish that *Thomas Cassop Armstrong* clearly understood

stood what he was about, and shew what he considered the Plaintiffs entitled to and what he intended to do, and further that this agreement really carried into effect that intention. The agreement was as follows. [*His Honor here read it (a).*]

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The question is, what is the effect of this memorandum, taken in conjunction with the facts which have actually occurred. It has been argued, that this memorandum cannot give any person, except *Thomas Cassop Armstrong*, any interest in the ship, for that would be contrary to the navigation laws and to the policy of them: you cannot, it is said, by possibility, give to any person, except those whose names appear in the register, any interest in a ship, and no interest in a ship can be conveyed except in the manner provided for by the Act of Parliament. I concur in that argument, and my decree is not founded upon any dissent from a proposition so expressed. Before I state my opinion on this agreement, and the facts connected with it, I will proceed to state what has subsequently occurred. In the first place, *Thomas Cassop Armstrong* clearly admits, as he did in his letters, that he considers himself bound in justice, [not to use any expression that would involve any question either of law or equity], to treat his brothers and sisters as equally interested in this property with himself, as being a part of the testator's estate, and the facts stated upon the memorandum are borne out by the rest of the evidence in this cause. Upon that, what takes place is this:—He sells the sixteen sixty-fourths to *William Richardson*, who admits he is accountable for the price of those sixteen sixty-fourths to such persons as may be entitled to receive it. He undoubtedly is of opinion that *Thomas Cassop Armstrong*

(a) See ante, p. 79.

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Armstrong is the person entitled to receive the price of the sixteen sixty-fourths, but he admits he is bound to account for the price of those sixteen sixty-fourths. The sixteen sixty-fourths of the ship have been transferred to him, according to the directions contained in the Navigation Laws and the Ship Registry Acts, and *William Richardson* is now the full and entire owner of the whole of the ship. He also admits, that he is bound to account for the freight of the ship, everything due to him being admitted to be paid. Those two sums he admits to be 700*l.*, for the price of the one-fourth of the ship, and 215*l.* 19*s.* for the amount of the freight, making together a sum of about 916*l.*, which the Plaintiff claims to have divided among them, and the question is whether they are so entitled. I am of opinion that this memorandum of agreement did not give them any right in the ship; that they could not have transferred or prevented the transfer of the shares in the ship which was proposed to be made by *Thomas Cassop Armstrong* and certainly they ought not to prevent any transfer being made by him for valuable consideration. The agreement was this:—not that they were to be owners of the ship, for *Thomas Cassop Armstrong* had himself, in one of the letters to which I have referred pointed out either the inconvenience or the difficulty of accomplishing that object; but *Thomas Cassop Armstrong* was himself to sell the ship, and they were then to become entitled to have the proceeds of one-fourth of the ship divided among them. He sells the ship, and thus acts in conformity with this memorandum. Having sold the ship and received the money (for I treat the money in the hands of *William Richardson* as exactly in the same situation), the question is, whether, in the state of circumstances, this memorandum is not sufficient to entitle the Plaintiffs to a share in the produce of the ship, and in the earnings of the ship in the hand

hands of *Thomas Cassop Armstrong*, or of *William Richardson*, who is ready to pay it to the persons entitled to it.

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I think it unnecessary to go into those authorities, which were very material, undoubtedly, upon the motion for the injunction, such as the case of *Mestaer v. Gillespie* (a), and those other cases which lay down the principle, that upon evidence of fraud, this Court would interfere to prevent the sale of ships, because it appears to me that this is a question relating simply to the produce of the sale of a ship, the division of which has been settled by an agreement, in my opinion, binding upon the parties. I am at a loss to understand, if the argument is pushed to its full extent, how the Court could get over the inevitable fraud and evils which would result from deciding according to the Defendant's contention; the consequence would be, to hold that the navigation laws not only prevent any right in a ship, except for those whose names appear upon the register, but also in the produce of the ship. Take this case, which is of daily occurrence:—a ship-owner dies possessed of a large number of ships, and he appoints executors, is it to be contended, that having left directions that his ships should be sold and the money divided among his legatees in certain proportions, the executors may say, "this is our ship, we are entitled to it by law," which would be the case, because the ship would appear on the register in their names. Could they be allowed to say "we have sold the ship, and as no interest can be given in it by any act, except that specified in the Registry Act, so neither can it be given in the proceeds of the ship, and therefore the *cestuis que trust* under the testator's will cannot call on us to account for the produce." I apprehend it is quite

(a) 11 Ves. 621.

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quite impossible that the principle can be carried such an extent. Suppose the owner of a ship entered into a contract with another person for valuable consideration, and says, "I agree to sell the ship and divide the proceeds between you and me, in consideration of your doing some particular act." I admit that this gives no interest in the ship, but when he sells the ship and becomes possessed of the proceeds, would this Court say, that this case, involving merely a question as to the right to a sum of money, is open to the evils which the navigation laws and the Ship Registry Act were intended to prevent, so that nobody can acquire any interest in the proceeds of a ship, because it is desirable that a foreigner shall have any interest in the ship itself? I apprehend that the argument cannot be maintained.

Thomas Cassop Armstrong, when he entered into this contract, knew that the Plaintiffs claimed as against him the assets of his father, that which had been applied in the purchase of the ship, and that, at any rate, he was liable to them for the money of the father which he had applied in payment of the ship, unless he could shew that the father had given it to him, which indeed the evidence entirely fails in shewing. Is not this a sufficient consideration to support an agreement of this description the facts shewing that the testator's money was in fact applied in payment of this ship? In my opinion, this is quite sufficient to make the agreement for the division of the money arising from the sale of the ship, in the hands of the registered owner, valid and effective.

The cases that have been cited do not appear to me to touch or affect the view which I take of this case. *Brewster v. Clarke* (a) was not a case of fraud, neither was *Thompson v. Leake* (b), it was a case of mistake.

(a) 2 Mer. 73.

(b) 1 Madd. 39.

mistake. *Newnham v. Graves* (a) was not a case of fraud; *Battersby v. Smyth* (b), was a case of agreement for the sale of a share in the ship; the bill was filed for that purpose, and a demurrer was allowed. In all those cases an endeavour was made, by means of the contract between the parties or of their acts, to obtain a share in an existing ship, then registered in the name of another person. The case of *Follett v. Delany* (c) is of that description, and in that case, the Vice-Chancellor expressly points out, that he does not express any opinion on what would have been the result if it had been a case of fraud. The case of *M'Calmont v. Rankin* (d) appears to be very important in this view of the case; it lays down, expressly, that no interest in the ship can be acquired in such cases, and it also points out, that although the Court has frequently spoken of fraud making an exception, there is no case to be found in the books in which the particular fraud which would create an interest in a ship has occurred; but the Lord Chancellor expressly says, that his decision is not in any degree to affect the case relating to the produce arising from the sale of the ship. The passage to which I refer is this (e):—"It has been most elaborately argued, that I might and ought to give effect to the transaction as regards the proceeds of the vessel, although I cannot affect the vessel itself. I do not lay down any rule that parties cannot authorize a ship to be sold, and direct in what manner the money shall be applied, that is quite a different question. But the question before me is this:—the Plaintiffs claim the right, under certain documents, which they say vest the property of the vessel in them, but for the Ship Registry Acts, and being forced to relinquish such right to the vessel,

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(a) 1 *Madd.* 399, n.

(b) 3 *Madd.* 110.

(c) 2 *De G. & Sm.* 235.

(d) 2 *De G. M. & G.* 403.

(e) 2 *De G. M. & G.* p. 424.

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vessel, they say they have an equity to that which represents the vessel, namely, the price produced by the sale of the vessel, and that a Court of Equity is bound to give effect to that claim." Then his lordship proceeds to state that in his opinion, that is not so, and that he cannot regard the contract under the documents which were produced as not giving a right to the vessel, and consequently, that the Plaintiffs were not entitled to the proceeds. My opinion is, that the agreement here does not give any interest in the ship, but it is an agreement, that at the expiration of the period mentioned, *Thomas Cassop Armstrong* is to sell the shares and pay over the proceeds thereof according to the will of *Thomas Armstrong*. That is exactly what Lord *St. Leonards* in the case says (a):—"I do not lay down any rule that parliament cannot authorize a ship to be sold and direct in what manner the money shall be applied." This is, in fact, an agreement directing a ship to be sold, and authorizing in what manner the money to arise from the sale of the ship shall be applied.

The part of the agreement that relates to the freight of the ship stands upon a different ground, and is not affected by the Ship Registry Acts.

The result is, that, in my opinion, this is an agreement which is binding on *Thomas Cassop Armstrong*; that it is capable of being enforced in this Court, and that the money arising from the sale of the ship being now available, he is bound to account for it in the manner provided by this agreement.

When the case came before me on the motion for a writ of injunction, I undoubtedly thought that a fraud was being perpetrated, and that *Thomas Cassop Armstrong* was to be effected, and that *Thomas Cassop Armstrong*

(a) 2 De G. M. & G. 424.

strong either intended, or that it was possible he intended, (for he did not appear before me on that occasion,) to sell the ship for a nominal consideration, and in point of fact obtain the benefit of the real price in another manner, and this I thought would be a fraud upon the agreement. I thereupon thought it proper to restrain the sale, for the purpose of seeing what case should be made out at the hearing of the cause. Besides this, upon the affidavits made upon the motion, *William Richardson* did not state that he had bought the ship for 700*l.*, and that he held the proceeds, and was willing to account for the price, in such manner as the Court should think right. It was on these grounds that I granted the injunction, because, without intending to express any opinion on the merits of the cause, I thought there was a serious and important question to be tried, the trial of which could only be ensured by granting the injunction. But now, upon the hearing of this cause, the case has assumed a very different aspect, and it appears that in fact a *bonâ fide* sale has been made to *William Richardson*. If he had made that case in the first instance, I should have considered him a mere stakeholder, I should have directed him to pay the money into Court, and have given him all his costs of the suit. As it is, it appears to me that *Thomas Cassop Armstrong* now claims something inconsistent with the agreement entered into by him, which, in my opinion, is a legal agreement, binding the proceeds to be received and which must be divided accordingly. I shall therefore make a decree in favour of the Plaintiffs, upon the proceeds of the ship, prefacing the decree by a statement that "it appearing, or it being admitted by *William Richardson*, that there is now in his hands 700*l.* as the price of the sixteen sixty-fourths of the ship, and also the sum of 215*l.* 19*s.*, in respect of the earnings of those sixteen sixty-fourths of the ship," direct that money
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to be paid into Court. I shall then declare, that according to the agreement the fund ought to be divided between the persons in the shares specified in the agreement.

I am of opinion that I cannot give *William Richard* any costs of the suit, as I should have done, in the case which he now makes at the hearing had originally been made by him, on the motion for the injunction, but I shall not order him to pay any costs. *Thomas Cassop Armstrong* must undoubtedly pay the costs. In my opinion he has done that which makes him entirely in the wrong in this case.

I may add that the case of *Prouting v. Hammond* (a) appears to be a distinct authority, at law, for the same proposition which I am laying down here. In that case the Court of Law expressly held, that the navigation laws did not prevent an action of assumpsit to recover the money from a person who had sold the ship and had the proceeds in his hands. That appears confirmed by the view which Lord *St. Leonards* took in the case of *M'Calmont v. Rankin*, to which I have already referred.

The case in *Hare's Reports* of the ship "*Cambrian*," was a different matter altogether. There, if the ship had arrived at *Liverpool*, and the proceeds had been divided, this Court would not have interfered, but it was an attempt to get an interest in the ship itself, by reason of the proceedings which had taken place, and the Court was of opinion that this could not be effected.

(a) 8 *Tamton*, 688.

Hammond v. Prouting (Lords Justices), August 3, 1855; *Collinson v. Lister* (Lord *St. Leonards*) v. *Batters*, 1 *Ky & J.* 242.

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COURTIER v. ORAM.

June 22.

July 2.

THE testator having a son, *Thomas*, two daughters, viz. *Hannah*, the wife of Mr. *Oram*, and *Susannah*, the wife of Mr. *Rose*, and a granddaughter, *Betsey Anderson*, the child of a deceased son, made his will in 1826.

A testator bequeathed the income of his residuary estate between his three children, and when any child died, his part to be equally divided amongst the testator's surviving grandchildren; and likewise, if any of his grandchildren died, their part to be divided amongst the survivors of his other grandchildren. Held, that the gift over, upon the death of a grandchild, to the surviving grandchildren, was void for remoteness.

He thereby expressed himself as follows:—"I order the residue to be divided amongst my children as follows, when it is ascertained what it will make," &c. &c. . . . "I order, when ascertained, what money or income there is to be divided into three shares, and one-third of each share, allowing one share to each son and daughter." After a clause as to the interest intended for *Betsey Anderson*, and for the payment of a debt of Mr. *Rose*, which are immaterial for the present purpose, the testator proceeded as follows:—"And when any of my children dies, their part to be equally divided amongst the surviving children of my children, and likewise, if any of my grandchildren dies, their part to be divided amongst the survivors of my other grandchildren, whether in moneys, houses or rents. And in case all my children, and my children's children, should die, the whole to be given to my nephews and nieces of my own family, as mentioned on the other side of this paper."

The testator died in September, 1826, *Hannah Rose* died in December following, *Thomas Anderson* died in 1827, and *Susannah Rose* was still living. There were four grandchildren only, all of whom were living at the testator's

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testator's death; of these, *William Oram* died in 1835, and *Betsey Courtier* in 1843.

On the deaths of the testator's children, *Hannah* and *Thomas*, their shares went over to the four surviving grandchildren, and the principal question was, whether on the deaths of the two grandchildren, *William* and *Betsey*, their shares went over to the two surviving grandchildren. This depended on the question, whether the gifts over to the surviving grandchildren were or were not void for remoteness.

Mr. *Lloyd* and Mr. *Wickens*, for *James Anderson Rose* and *William Anderson*, the two surviving grandchildren.

Mr. *Cairns*, for Mrs. *Rose*.

Mr. *Roupell*, Mr. *Greene*, Mr. *R. Palmer* and Mr. *Humphrey*, for other parties.

Mr. *Lloyd*, in reply.

The following cases were cited, *Greenwood v. Roberts* (a); *Jarvis v. Pond* (b); *Coulthurst v. Carter* (c); *Gooch v. Gooch* (d); *Storrs v. Benbow* (e).

July 2. *The MASTER of the ROLLS.*

The question in this case turns upon the construction of the will of *William Anderson*, a person in easy circumstances

(a) 15 *Beav.* 92.
 (b) 9 *Sim.* 549.
 (c) 15 *Beav.* 421.

(d) 14 *Beav.* 565; 3 *De G. Macn. & G.* 366.
 (e) 2 *Myl. & K.* 46.

circumstances but not very conversant with letters, and whose will, made without professional assistance, contains a series of those blunders usually found in wills of that description. These blunders do not however, in my opinion, prevent the Court seeing what he really intended to express.

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The principal difficulty arises on this passage, which, in my opinion, applies generally to all the shares into which the testator divided his property,—“and when any of my children dies, their part to be equally divided amongst the surviving children of my children.” This is a perfectly good disposition of the share of any of the children amongst the surviving grandchildren. It cuts down the interest before given to the children to a life interest, and provides, that upon the death of any child, the share of that child shall be divided among all the grandchildren who should be alive. The will then proceeds thus:—“and likewise, if any of my grandchildren dies, their part to be divided among the survivors of my other grandchildren.” Then follows a gift over to the nephews and nieces:—“In case all my children and children’s children should die.” This means, in case they all die before they attain a vested interest, and that would be perfectly good; but that is not the event which has arisen. The question is, what is the effect of the gift over, if any of the grandchildren die, that is, in the event of the death of the grandchildren.

Now, previously to this clause, there was a vested gift in the children, cut down to a life interest, and a gift over to the surviving grandchildren of the testator. Those vested gifts in the shares must remain vested, unless and until they are properly and effectually divested. Now, upon the death of each grandchild, the share

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share was to be divided among the remaining grandchildren, and the question is, whether this is not void, as offending against the laws against perpetuities, and if it be void, then whether the interests being previously vested remain so, there being no subsequent valid disposition of the property.

I have come to the conclusion that this limitation is void for remoteness. *Storrs v. Benbow* (a) does not apply to this case. *Gooch v. Gooch* (b) does incidentally apply, but there are other cases which illustrate more clearly why I think the limitation is too remote, such as *Vawdry v. Geddes* (c); *Dodd v. Wake* (d). The principle is this:—Where a testator gives a life estate to one of his daughters, with remainder to the children of the daughter, to be vested in them upon attaining the age of twenty-two years, that is the ordinary case of being too remote; for although they might all have been in existence at the death of the daughter, yet the class is not to be ascertained until more than twenty-one years after the testator's death.

Now that is the case here. There are three families, which makes it a little more complicated, but in effect it is the same thing. There is a gift to the testator's three children, and, on the death of either of them, their part is to be equally divided amongst the testator's surviving grandchildren, then, upon the death of any such grandchildren, there is a gift over. It is obvious that this might happen much more than twenty-one years afterwards.

Vawdry v. Geddes was a case of this description:—
 The

(a) 2 *Myl. & K.* 46.
 (b) 14 *Beav.* 565.

(c) 1 *Russ. & M.* 203.
 (d) 8 *Sim.* 615.

The testatrix gave the residue to her four sisters during **their** lives, and directed that upon their death the interest of their respective shares should be applied, at **the** discretion of the executors, for the maintenance and education of the children of each sister so dying, until **the** children attained twenty-two years, when they were **to** become entitled to the mother's share. The real question which was argued in that case was, whether it was **vested** in the children before their attaining twenty-two. **Sir John Leach** held, that the gift was not vested in the **children** until they attained twenty-two; he was unable **to** distinguish that case from the residuary gift in *Leake v. Robinson* (a), and he decided that the gifts were too **remote** and void, because, although the bequest was to **be** among a class of persons, the different members of **wh**ich must have been all in existence at the death of the **tenant** for life, yet the class might not possibly be ascertained until twenty-two years after that time.

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Dodd v. Wake expresses the same thing. There the **testator** gave 30,000*l.* unto and amongst the children of his daughter *Mary*, who should be living at the time **the** eldest should live to attain the age of twenty-four years, &c. &c., to be paid and payable to them respectively, when and as they shall attain twenty-four years. The Vice-Chancellor of *England* says (b), "the testator appears clearly to have intended, that only those children of his daughter should take who should be alive when **the** eldest child for the time being should attain the age of twenty-four years, and therefore the bequest is void for remoteness."

That is very near the present case. Here you may paraphrase the expression by saying "the testator clearly

(a) 2 *Mer.* 363.

(b) 8 *Sim.* p. 616.

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clearly intended that those grandchildren should who should be alive when the first grandchild, 1 time being should die." The bequest is therefor for remoteness.

The result is, that, in my opinion, this is a good gift to the children—a good gift, upon the death of the children, to the grandchildren, but the gifts over are for remoteness, and there being an absolute and qualified interest given to them in the first instance, the absolute gift is not divested (a).

(a) See *Carver v. Bowles*, 2 10 Beav. 200; *Stephens v. Russ. & M.* 301; *Kampf v. Jones*, 20 Beav. 463; *Geering v. Keen*, 756; *Ring v. Hardwick*, 2 Beav. 352; *Scawin v. Watson*, Butler, 20 Beav. 541.

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WATTS v. SHRIMPTON.

February 20.

July 31.

August 6.

THE testator devised certain real estates to *C. C.* for life, with remainder to his first and other sons in tail, but subject to a term of 1,000 years, to commence on the testator's death, for raising 10,000*l.*, together with interest for the same from *C. C.*'s death, and which was to be paid amongst the younger children of *C. C.*, as he should appoint, and in default, equally between them.

A trust term was created for raising the sum of 10,000*l.*, with interest from the death of the tenant for life, for his younger children as he should appoint, and in default, to them equally. He appointed the fund to his two younger children, in unequal proportions, after the decease of himself and of his mother. Held, that the intermediate interest, between the deaths of the tenant for life and his mother, was unappointed, and that it belonged to the two children equally, and did not pass as

C. C. died in 1846, having by his will appointed the whole 10,000*l.* between his two younger children (a son and a daughter), in unequal proportions, *i. e.* 7,000*l.* to one and 3,000*l.* to the other, "*after the death of his mother and himself.*" His mother died in 1853.

A question arose, whether the interest which accrued on the 10,000*l.*, between the death of *C. C.* and that of his mother (from 1846 to 1853), was divisible between his two younger children in the proportions in which he had appointed the capital to them, or whether it was unappointed and divisible equally.

Mr.
 accessory to the capital appointed.

An Englishwoman married a domiciled Frenchman. Articles were, previous to the marriage, executed in the English form, by which the wife became entitled to 200*l.* a year. Her husband afterwards separated from her, and subsequently the French Court condemned her for adultery. Held, that the contract of marriage was English, and that the rights of the parties were to be regulated by the English law, and further property of the wife having fallen into possession, and the moral conduct of both parties being reprehensible, the income of the fund must be equally divided between them.

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Mr. *Roupell* and Mr. *Elderton*, for the Plaintiff, trustee of the term.

Mr. *Lloyd*, Mr. *Karslake*, Mr. *R. Palmer* and *T. H. Hall*, for the daughter and her husband, contended, that the intermediate interest between the death of *C. C.* and his mother was unappointed, and was to go between the two younger children equally, as in fault of appointment.

Mr. *Hardy*, for the younger son, contended, that the whole interest, from the death of his father, upon 7,000*l.* appointed to him, passed as accessory to capital.

The MASTER of the ROLLS was of opinion, that the interest which accrued due on the 10,000*l.*, between the death of the tenant for life and that of his mother, was unappointed, and became divisible in equal moieties between the two younger children.

July 31. The daughter became thus entitled to a portion of the fund in Court, which consisted of 3,296*l.* stock, capital, and 1,743*l.* income, and a second question then arose out of the following circumstances :—

It appeared, that in 1834 she had married *S.*, who now presented a petition, by which he claimed to be entitled to the dividends which should, during the joint lives of himself and his wife, accrue due on the 3,296*l.* capital stock, and to the absolute use and benefit of the arrears of interest (1,743*l.*), and he prayed payment accordingly.

Accordi

According to the statements in his petition, Mr. S., in 1831, obtained provisional letters of naturalization as a Frenchman, and being, in 1834, a domiciled Frenchman, he intermarried with Mrs. S. in that year. Articles of agreement in the English form, dated the 5th of November, 1834, were executed previous to the marriage, by which Mrs. S. became entitled to about 200*l.* a year for her separate use, but which did not affect her interest under the will or under the testamentary appointment of her father.

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On the 17th of October, 1843, the Petitioner was fully naturalized as a Frenchman.

There had been two children of the marriage, both of whom were dead. In 1844, the Petitioner separated from his wife, and had ever since continued to live separate from her; and on the 30th of November, 1847, the Tribunal of Correctional Police of the Department of the Seine had condemned Mrs. S. for adultery.

Under these circumstances, the Petitioner insisted, that the respective rights of himself and his wife, in the property in question in this suit, were governed by the French law; that it was comprised in the legal community of goods, which, according to the French law, existed between them, in the absence of any special provision in derogation of or modifying the laws of community of property; that the husband, as the chief or primary representative of the legal community of the property, had alone the right, during the continuance of such community, to receive the interest and annual produce and all arrears of or accruing from all principal moneys and real and personal property or estate whatsoever, belonging to the wife at the time of her marriage, or to which she, or her husband in her right might have



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become entitled during such marriage; that this community continued during the joint lives of husband and wife, so long as the separation of their property had not been judicially pronounced, and that such community was not, nor were the rights of the husband affected by his living separate and apart from the wife, and that she had no equity to a settlement.

There were affidavits in support of the petition, impugning the wife's conduct, and these were met by affidavits on her side of the misconduct of the husband.

Mr. Lloyd and Mr. Karlake, for the husband. The domicile of the husband, and consequently that of the wife, being in *France*, the Court will inquire, in what way the matter would be disposed of by the French tribunals, and how, according to the French law, the fund would be distributed; for where there is no express contract to the contrary, the law of the matrimonial domicile governs the right to the personal property of the wife, wherever situated; *Story's Conf. (a)*; *Duncan v. Cannan (b)*.

In this case, there is no contract governing the money, for the settlement was confined to a particular sum, and was silent as to this fund, therefore the law of the domicile governs, which is the law of *France*, for the husband is domiciled and there the marriage took place.

The evidence and the *Code Civil (c)* shew, that the husband is entitled to what he claims, and that the wife, under the circumstances, has no equity to a settlement.

Hutchins

(a) Page 253.
(b) 18 *Beav.* 128.

(c) Article 1421, and see
Pothier (edit. *Dupin*) 49, 293.

Hutchinson v. Cathcart (a), in which case it was held, that an Englishwoman having married an Austrian had lost her equity to a settlement, the Austrian law entitling her to none. *Sawer v. Shute* (b) was also cited.

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Mr. R. Palmer and Mr. T. H. Hall, for Mrs. S., insisted on her right to a settlement, and on the protection which the English law gave to an Englishwoman. They argued that the contract was English and made between English subjects, and that it settled all the property then existing of the lady. That she was interested in the property at her marriage, under the will of 1817, and that this was not a future acquisition, but a fund existing at the date of the marriage, for in default of appointment she was entitled to a share of the 10,000*l.*; that she had married contracting that the English law should settle her rights, at least to the then existing property. That if this Petition prevailed, a husband could, in any case, destroy the wife's equity to a settlement, by changing his domicile to that of a country which excluded the wife's right to a settlement.

That *Este v. Smyth* (c), and *Duncan v. Cannan* (d), when properly considered, were authorities in favour of the wife's equity, which rested on the peculiar circumstances. That here the husband was compelled to come to this Court for the fund, and it would thereupon fasten on him the condition of doing what is just towards his wife.

Mr. Lloyd, in reply. The parties married on the faith of the law of the husband's domicile. This was French at the date of the marriage, for he was then an assistant surgeon in a French regiment. The contract of foreign

(a) 8 *Irish Eq. Rep.* 394.
(b) 1 *Anstruther*, 63.

(c) 18 *Beav.* 112
(d) 18 *Beav.* 128.

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foreign service alters the domicil, as in the case of service in the Indian army, as distinguished from the Queen's military service.

The place where the marriage is solemnized is immaterial; *Warrender v. Warrender (a)*; though here, the marriage in fact took place in the ambassador's chapel at *Paris*, which, by fiction of law, is in *England*.

The MASTER of the ROLLS reserved judgment.

Aug. 6.

The MASTER of the ROLLS.

I am of opinion that the marriage contract was English, and that the English law regulated the rights of the husband and wife at the time of the marriage; that, consequently, property coming to the wife subsequently must be dealt with according to the English law, by the Courts in this country, which have dominion over the fund, although the husband is now a domiciled Frenchman. I think the course which would be adopted by the French Courts, as regards a sum of money in that country over which they had control, is not to be regarded in this matter. I shall not, therefore, direct any inquiry relative to the French law, but deal with the matter as if this question had arisen shortly after the marriage had taken place.

So considering it, the conduct both of the husband and wife becomes material. On both sides, as appearing on these affidavits, their conduct is open to great reprehension. I abstain from commenting on the acts of both parties, but shall consider it sufficient to say, that
 having

(a) 2 *Clark & Fin.* 488.

having regard to those acts, I think that I shall best consult justice and follow the rules laid down in the decided cases, by dividing that part of the fund in Court which consists of past income (after paying the costs) and the future income, equally between the husband and wife.

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PASMORE v. HUGGINS.

Nov. 8.

THE testator by his will, dated in *January*, 1832, gave his real and personal estate (except the trust moneys and stock comprised in his marriage settlement) to *Strong* and *Huggins*, upon trust to sell and invest, and pay the dividends "to his sister *Grace Huggins*, for life, for her sole use, separate from her then present or any future husband." And after her decease, the Principal was to be upon trust for the children of *Grace Huggins* (whether by her said then present or any former husband), who should be living at her decease, equally, as tenants in common, and the issue then living of any of the deceased child or children of the said *Grace Huggins*, whether such child or children should have died in his (testator's) lifetime or after his decease. . . . The issue of any deceased parent or parents to take the part only which would have belonged to their parents respectively, if such parents respectively had been living at the death of the said *Grace Huggins*. And he empowered his said trustees to apply the income of the shares of any such issue who should be then under age, and also the capital, for their maintenance, education

In the construction of wills, the Court looks not only to the terms of the will itself, but to the surrounding circumstances and the state of the parties. Upon this principle, where a testator gave the income of a fund to his sister (then sixty-eight years of age and married to a second husband) for life, and after her decease, bequeathed the fund to her children "by her then present or any future husband," and she had children by both her first and second husbands, it was held, that the children by her former marriage were not excluded.

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education and advancement. And the testator directed his trustees to place out the residue of the trust money mentioned in his marriage settlement, and after the death of his wife, "to pay the interest unto *Grace Huggins* for life, for her sole use, separate from her said then present or any *future* husband," &c. "And after her decease, the principal was to be upon trust for and to go to the children or child of the said *Grace Huggins* lawfully begotten (*whether by her said present or any future husband*), who should be living at her decease if but one, to that one, and if more than one, equally as tenants in common, and the issue then living of an then deceased child or children of the said *Grace Huggins*, whether such child or children should have died in his (testator's) lifetime or after his decease. . . . The issue of any deceased parent or parents to take that part only which would have belonged to their parents respectively, if such parents respectively had been living at the death of the said *Grace Huggins*." And the trustees were thereby empowered to apply the income and principal of the shares of any such issue respectively, as should be under twenty-one, for their maintenance, education and advancement, "in the same manner, in every respect, as he had thereinbefore directed with respect to *their* said respective shares of his residuary estate and effects thereinbefore bequeathed," as to which he had made the usual provision.

The testator died in *August*, 1832.

At the date of the will, *Grace Huggins* was sixty-five years of age, and had been married, first to *James Pasmore*, and secondly to *William Huggins*, her then husband. The two Plaintiffs were the only children by the first marriage, and by the second marriage there were three children living at the date of the will, and who were

were still living; two others had died before the date of the will, leaving issue.

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Grace Huggins died in 1854, and the residuary and settled funds then became divisible. The children of the second husband claimed the whole of the settled property, but the Plaintiffs, by their bill, claimed one-seventh each, contending that the word "future" was, by mistake, written for the word "former." The bill prayed a declaration accordingly.

Mr. R. Palmer and Mr. Karlake, for the Plaintiffs. The trusts declared by the testator as to the two funds disposed of by him, viz. the residuary estate and the fund comprised in his marriage settlement, are similar, except as to one word, which the Plaintiffs contend is a clerical error. In the trusts for the children of *Grace Huggins* declared by the testator with regard to the residue of his own estate in the former part of the will, the words are "to go to the children or child of the said *Grace Huggins*, lawfully begotten (whether by her said then present or any former husband), who should be living at her decease;" but when he declares the trusts of the settlement money, in the subsequent part of the will, he gives it to the children "by her said then present or any future husband." It is clear that by mistake the word "future" is used for "former." There is the usual clause authorizing the application of the shares (income and principal) of the residuary estate, for the maintenance, education and advancement of the children of *Grace Huggins* by her then or any former husband, and there is the like clause as to the shares of any such issue of the settlement money, which authorizes the trustees to apply it for their maintenance, "in the same manner, in every respect, as he had thereinbefore directed with respect to their said respective shares of his

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his residuary estate and effects thereinbefore bequeathed.'—
Grace Huggins was at that time married to her second husband, and was at an age (sixty-five) when all probability of her having any more children was at an end, and this, of course, was known to the testator, and he could not reasonably have contemplated *future* children. There was a case before the Court lately (*Goodfellow v. Goodfellow (a)*), in which a bequest to two children then born, by name, and "the child of which his wife was then *enceinte*" was held to extend to a fourth child, born three years after the date of the will. So here, the testator means all the children of his sister *Grace Huggins*, as the limitations apply equally to former and future children, whether there is a clerical error or not. He had a reason, too, for keeping the two funds distinct, for he had only a power of appointment over the settlement fund after his wife's death. It is clear, therefore, from the context, that the Plaintiffs are entitled to participate equally with the other children, and that is one way of disposing of the case. But if that should fail, then there remains the bold and open way of solving the difficulty, by turning the word "future" into "former," for which course there is abundant authority; for though in *Mellish v. Mellish (b)*, and *Philipps v. Chamberlaine (c)*, the principle is distinctly enunciated, that a will cannot be varied or corrected, or any omission supplied on the ground of mistake, unless the alleged mistake is clearly inconsistent with the intention upon the whole will, or appears so by fair inference from the whole will, yet in the latter case a mistake was corrected, upon the clear intention appearing on the whole will. On the same principle, in *Bengough v. Edridge (d)*, the word "hereinafter" was changed

(a) 18 *Beav.* 356.
 (b) 4 *Ves.* 45.

(c) 4 *Ves.* 51.
 (d) 1 *Sim.* 173.

changed into "hereinbefore." So in *Doe d. Gallini v. Gallini* (a), the word "all" was read "any," and the words "without issue" were read "leaving issue." And in *Hart v. Tulk* (b), the words which created the difficulty were "the said fourth schedule," and the Court did not shrink from boldly changing them into "the said fifth schedule," as being a reasonable and consistent construction of the will. It may be argued that there is no ambiguity here, and one construction will do as well as another, and therefore there is no reason to have recourse to extrinsic evidence; but in the case last cited, Lord Justice *Knight Bruce* meets that argument, and adopts the reasonable and consistent construction in preference to that which is capricious and unreasonable.

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Mr. *Lloyd* and Mr. *Giffard*, for some of the children of the second husband, contended, that as in *Gompertz v. Gompertz* (c) there was here a distinct and positive gift, excluding the children of the former marriage, and in case of the death of any of the children of *Grace Huggins* by her then present or any future husband, there was a gift by substitution to their issue, and therefore there was no ground whatever for any change of the word "future" into "former." They cited *Jarman on Wills* (d).

Mr. *Roupell* and Mr. *J. H. Palmer*, for other children of the second husband, contended, that the Plaintiffs, the children of the former marriage, were excluded, on the ground that as other persons of the family had excluded them, the testator might also have intended to do so in this indirect way, to avoid doing it pointedly.

The

(a) 5 Barn. & Adol. 621; 2 Nev. & Man. 619; and see S. C. 3 Ad. & El. 340; 4 Nev. & M. 894.

(b) 2 De G. Muc. & G. 300.

(c) 2 Phill. 107.

(d) Vol. i. c. 15, p. 394, (second edit.)

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I think that upon the construction of this will, the meaning of the testator is clear. I concur in the observation that former decisions upon wills afford very little assistance, and that the Court must be governed by the will itself, considered with reference to the surrounding facts and circumstances. The first observation I have to make on the clause itself, without taking into consideration the surrounding circumstances, is, that after the decease of *Grace Huggins*, I find that the residue of the settlement money is "to go to the children or child of the said *Grace Huggins*, lawfully begotten." These words would clearly include all her children; and then the testator goes on to say, "whether by her present or any future husband." I think it is a just observation, that this latter clause is not such as is usually employed where there is an intention to exclude any particular class. If the testator had intended to limit the gift to the children born of her then present husband, to the exclusion of those by the former husband, he would not, I think, have used this form of expression, which would appear to have been employed rather for the purpose of preventing than of effecting the exclusion of any class whatever; he would simply have said, "to the children born of the present marriage." This is made the more clear from what follows, for the testator proceeds to provide for the issue of deceased children—"and the issue then living of any then deceased child or children of the said *Grace Huggins*, whether such child or children should have died in his (testator's) lifetime or after his decease." Now it is obvious, that if he gave a benefit to the issue of *any* child of *Grace Huggins*, he must include the children born of the previous marriage; and there would also be this repugnancy,

nancy, if the children of the previous marriage were excluded, that the issue of such children as predeceased the testator would not be excluded, while the children themselves surviving would be excluded, and that by a parenthesis, the apparent meaning of which was to prevent the exclusion of any class whatever.

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Then with respect to the issue of any deceased children, the testator goes on to direct, that his trustees shall apply the income of the respective shares of any such issue who should then be under the age of twenty-one years, for their respective advancement, "in the same manner, in every respect, as he had thereinbefore directed with respect to *their* said respective shares of his residuary estate and effects thereinbefore bequeathed;" thus determining that he intended to give the same interest in the settled fund that he had already given in his residuary estate. The gift of the residue is very distinct; it is to the children of *Grace Huggins*, lawfully begotten, whether by her then present or any former husband.

Next, looking at the surrounding circumstances and the state of the parties, which are proper subjects for consideration in the construction of wills, I find that *Grace Huggins* had been previously married, and had issue of such marriage, who were, therefore, proper objects of the testator's bounty, and I also find that Mrs. *Huggins* was of an age when no reasonable person could suppose that she would have any more children.

I cannot adopt the argument, that the testator intended in this indirect manner to do what he was unwilling to do in express terms, and my opinion is, that the Plaintiffs were not excluded either inferentially or intentionally, but that this clause was put in
ex

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ex abundanti cautelâ; and possibly that by mistake, the word "future" was written for "former," the word used in the disposal of the residue. But I do not go upon that ground, I proceed upon the ground that the general gift to the children is not cut down by this parenthesis, and that it would be inconsistent with and repugnant to the rest of the will were I so to hold. I shall therefore make a declaration in the terms of the prayer of the bill.

April 21.

Nov. 10.

By the conditions of sale, the title-deeds were to be delivered to "the purchaser of the largest lot." A. purchased the largest lot in value and extent, but B. purchased several lots, whose aggregate value and extent exceeded those of A.'s lot. Held, that A. was entitled to the custody of the deeds.

SCOTT v. JACKMAN.

SOME property was sold in twelve lots, and one of the conditions of sale was as follows:—

That, in all cases, where two or more lots are held under the same title, the title-deeds and documents now in the vendor's possession relating to such lots shall be delivered to the purchaser of the *largest lot*, or retained by the vendors, in case all the lots shall not be sold, and such purchaser or vendors shall enter into covenants with the purchasers of the other lots, at their expense, to produce such deeds and documents when required.

The Plaintiff *Scott* purchased the largest lot in value and extent, but Messrs. *Morland* and *Wilkinson* purchased a number of lots, numbered from three to twelve, which separately were less than the Plaintiff's, but in the aggregate exceeded the Plaintiff's purchase both in extent and value.

The question was, who was entitled to the custody of the purchase deeds.

Mr.

Mr. Lloyd and **Mr. Smythe**, for the Plaintiff, cited **Lord Kennaird v. Christie** (a); **Seton on Decrees** (b); **Griffiths v. Hatchard** (c); 3 **Sugden, Vend. & Purch.** (d); 2 **Sugden, Vend. & Purch.** (e).

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Mr. Bovill, for the Defendant, the vendor, *contra*, argued, that it appeared from the other conditions of sale, that the words "lot" and "lots" were used as equivalent. That the whole contest in the suit related to this particular point, and that as the Plaintiff was not entitled to the deeds, and was wrong in the litigation, he ought to pay the costs.

The MASTER of the ROLLS said that he did not concur in the argument on behalf of the Defendant, and he must make a declaration that the Plaintiff was entitled to the custody of the deeds; that he was of opinion, that the litigation had been created by the conduct of the Defendant, and he must therefore pay the costs of the suit.

(e) **LORD KENNAIRD v. CHRISTIE.** In this case some property had been sold in lots, with this condition:—"N.B. As the title to all the preceding lots, except No. 5, is derived under one set of deeds, the purchaser of the largest lot is to be entitled to the custody of the title-deeds," &c.
Lord Beauchamp purchased

Lot 6 for 1,430*l.*; **Mr. Luard** purchased Lot 2 for 1,000*l.* and Lot 3 for 520. **Lord Eldon** ordered the deeds to be delivered to **Lord Beauchamp**.

- (b) Page 611 (2nd edit.)
- (c) 1 *Kay & Johnson*, 17.
- (d) App. No. 4.
- (e) Page 92.

1855.

FINCH v. HOLLINGSWORTH.

July 4, 9.

The report of the case of *Pope v. Whitcombe* (3 Mer. 689) is inaccurate.

A testator gave real and personal estate to *A.* for life, and afterwards to his own relations, in such shares as *A.* should by will appoint. *A.* appointed it amongst the testator's relations "living at her death," and who were not the testator's next of kin at his death. Held, that the appointment was valid.

THE testator, by his will, gave his residuary real and personal estate to his wife, *Elizabeth Hales*, for life, and after her decease, he directed one equal moiety thereof to be conveyed and distributed amongst the relations of his said wife, and the other moiety to be conveyed, &c., "to his own relations, in such parts," &c. as his wife by her will should appoint.

The testator died in 1815, at which time his brother *James* and *Thomas* were his sole next of kin, and they both died in the lifetime of the widow.

In 1840, the widow made her will, by which, in exercise of the power of appointment over one moiety of her husband's property to "his own relations," she appointed to *John*, the son of the testator's brother *James* 10*l.*, and unto all *John's* brothers and sisters and all other the relations of the testator (if any) living at her death (except *Thomas Hales* and *John Hales* therein-after mentioned,) the sum of 10*l.* each; and she appointed all the residue of the said moiety unto *Thomas* and *John Hales*, the sons of the testator's brother, *Thomas Hales*.

The testator's widow died in 1841, and the question related to the validity of the appointment made by her will.

Mr. *Cole*, for the Plaintiff. This is a power of distribution amongst the testator's "own relations" living at

at his death. The expression "relations" is to be construed "next of kin," and the appointment made by the widow is invalid, it being made in favour of persons who were not the testator's next of kin at his death. The case is governed by *Pope v. Whitcombe* (a); in that case the tenant for life had a power "to dispose of the residue amongst the testator's relations, in such manner as she should think fit. She appointed to some persons who were related to the testator, but who were not his next of kin, and the appointment was held invalid, and the fund was divided amongst the next of kin at the testator's death.

Mr. Goodeve in the same interest.

Mr. Smythe, *contrà*. The appointment is perfectly valid; the "relations" intended were next of kin, not those living at the death of the testator, but at the death of the party who has the power; *Cruwys v. Colman* (b). The report of *Pope v. Whitcombe* (a) is inaccurate; this error is pointed out in *Sugden on Powers* (c), and corrected from the Registrar's book (d). The fund was there ordered to be paid to "the personal representatives of John Childe, the next of kin of the said testator," at the widow's death, and not as represented in the report between *John Childe* and the representatives of *Thomas* and *John Whitcombe*.

Harding v. Glyn (e); *Brown v. Higgs* (f); *Cruwys v. Colman* (g); *Cole v. Wade* (h); *Walter v. Maunde* (i); *2 Williams on Executors* (k); *Roper on Legacies* (l); *Attorney-General v. D'Oyley* (m), were also cited.

Mr.

(a) 3 Mer. 689.

(b) 9 Ves. p. 325.

(c) Vol. 2, pp. 267, 650 (6th edit.)

(d) Lib. 3, 1809, fol. 1535.

(e) 1 Atk. 469.

(f) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.

(g) 9 Ves. 319.

(h) 16 Ves. 27.

(i) 19 Ves. 424.

(k) Page 731.

(l) Pages 106, 143, 150, 1388, (4th edit.)

(m) 4 Vin. Abr. p. 485, pl. 16.

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Mr. *Woodroffe*, for other parties.Mr. *Cole*, in reply.*The MASTER of the ROLLS* reserved judgment.

July 9. *The MASTER of the ROLLS.*

The question, in this case, is as to the validity of an appointment made by the wife of the testator under the following clause in his will. [*His Honor stated it.*] The next of kin of the testator when he died were two brothers, who both predeceased the testator's widow. The widow has appointed the property not in favour of the testator's brothers, but in favour of their children, and the question is, as to the validity of the appointment.

The power is one of distribution and not of selection, for it is not disputed, that if the power had been of selection, the appointment would have been good. The case of *Pope v. Whitcombe* (a), as reported, is precisely in point; it holds that such an appointment is bad, and that the fund goes to the next of kin living at the testator's death. It was contended, that such was not the real decision.

The case of *Pope v. Whitcombe* has frequently been referred to by the text writers. It is cited in 2 *Williams on Executors* (b), in these words:—"Where the donee of the power was entrusted with a discretion merely in apportioning the shares, the property shall be divided among the next of kin living at the testator's death."

In

(a) Reported *ex relatione*, 3 Mer. 689. (b) Page 731.

In *Roper on Legacies* the case of *Pope v. Whitcombe* is referred to in three places as a binding authority. The learned editor of that work observes (a):—"The term 'relations' will be equally confined to the limits of the statute, where a power is delegated to a person to fix the amount of the share that each relation is to take, without entrusting him with a selection of the objects; for in such a case, the act appoints the persons, viz., 'the next of kin' in existence at the death of the testator. They then take vested interests, subject only to be altered in amount by an exercise of the power, and that being not at all or not legally executed, a Court of Equity will direct the property to be divided among them according to the statute, in exclusion of such of them as may afterwards happen to answer the description, at the death of the donee of the power. Thus in *Pope v. Whitcombe* (b), James Childe bequeathed his residuary estate to his wife for life, remainder to his son absolutely if he attained the age of twenty-one, but if he died before that period and without issue, the testator, after giving some legacies, directed his wife to dispose of the residue "among his relations, in such manner as she should think proper." The contingencies happened upon which the power was to arise, and the wife not having made a good appointment, in consequence of distributing the fund among persons not within the statute, Sir W. Grant ordered it to be divided among the next of kin of the testator at his death."

Again the same Author observes (c), "But if A.'s authority, instead of a power of selection, be confined merely to ascertaining the shares of such of the testator's 'family' as could claim under the Statute of Distributions, and

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(a) Page 106 (4th edit.)
(b) 3 Mer. 689.

(c) *Rop. Leg.*, page 143 (4th edit.)

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and who would be the next of kin, then if no appointment be made, or if made should it be void by the nomination of relations not within the statute, the testator's next of kin living at his death would alone be entitled to the property as being the sole objects of the power." In a subsequent passage (a) he refers to *Pope v. Whitcombe* in the same way. He says, "Suppose then the bequest be to relations in such shares and proportions as *B.* shall appoint. If *B.* make no appointment the testator's next of kin in *esse* at his (the testator's) decease will be solely and exclusively entitled."

Lord *St. Leonards* in his *Treatise on Powers* points out the difficulty in reconciling *Pope v. Whitcombe* (b) with the older authorities. He states that that case had been misunderstood. He says, "Upon searching the Registrar's book, however, it appears that no such point was decided in *Pope v. Whitcombe*, so that the authorities are uniform." On referring to the decree as entered, it appears to have been decided the other way. Unfortunately, no doubt, the opinions have been founded on that case, and property has been distributed on its authority. I have looked at the Registrar's book, and I find that the statement of Lord *St. Leonards* is strictly accurate. The decree is in direct terms, ordering the payment of the fund to the next of kin at the death of the donee of the power, and not a distribution of it amongst the next of kin at the testator's death; there is not only a distribution, but a declaration, and the Court, no doubt, decided the contrary to that which is reported. The fact therefore seems to be in strict accordance with what Lord *St. Leonards* states.

A decision in the contrary way might be productive
 of

(a) *Rep. Leg.*, p. 150 (4th edit.)

(b) Vol. 2, pp. 267, 270, 650 (6th edit.)

of great inconvenience ; in many cases it might be impossible for the donee to exercise the power, for all the relations living at the testator's death might be dead at the decease of the donee of the power and therefore there might then be no person in whose favour an appointment could be made. The same objection exists where there is a power to appoint to a class of individuals.

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On the whole, I am of opinion, that I must follow the real decision of the Court in the case of *Pope v. Whitcombe*, which I find to have been in favour of the person who was the "relation" of the original testator at the death of the donee of the power, and who would have taken, in case the first testator had died at the same time as the donee of the power. I regret that from the error in the report, which has been adopted by text writers, many gentlemen have most probably advised their clients in a manner contrary to the decree of the Court, and the result has possibly been, that executors have distributed the assets on the faith of that erroneous authority.

I am of opinion, that this appointment is good, and I will make a declaration to that effect.

1855.

DIXON v. GAYFERE. (No. 3.)

Nov. 10, 13.

A. agreed to purchase an estate from B., and, upon the estate being conveyed, to grant a life annuity to B., "to be secured by bond."
Held, that B. had no lien on the estate for payment of the annuity, and was merely entitled to have it secured by the bond of the purchaser.

BY an agreement, made in *August*, 1826, between Mrs. *Finucane* (who was entitled to half a real estate) and Mr. *Dunbar*, *Dunbar* agreed to discharge an unsatisfied claim of 500*l.* on Mrs. *Finucane*, "upon having an assignment of all the right and interest of Mrs. *Finucane* in the one-half conveyed to him," and upon such assignment, Mr. *Dunbar* thereby, in consideration of the conveyance of such property, agreed to pay Mrs. *Finucane* 25*l.*, and "to grant an annuity of 50*l.* per annum," during the several lives of three persons mentioned, "to be secured by bond," and Mrs. *Finucane* and Mr. *Dunbar* thereby "mutually agreed, to perform all such further acts as in law should be requisite for the completion of the agreement when required."

By subsequent dealings, the right to the half of the estate, which had never been conveyed, vested in *Fluker*, and the right to the annuity, which had never been secured and was greatly in arrear, had become vested in *Bayley*.

By the decree in the cause, made in 1853 (a), the rights of *Fluker* and *Bayley* to the estate and annuity were declared. And it was declared, that *Bayley* was entitled to have the arrears and future payments properly secured, according to the agreement; and if the same had not been so secured, then it was ordered, that the
arrears

(a) 17 *Beav.* 421.

arrears and future payments should be properly secured accordingly, such security to be settled by the Judge in chambers.

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Before the Chief Clerk, *Bayley* contended, that he had a lien on the estate for the consideration to be paid for the purchase, and to have the annuity and arrears secured by a charge on the property. On the other hand, *Fluker* insisted, that all that *Bayley* was entitled to was to have the personal security of the purchaser or his representatives for payment of the annuity. The point was adjourned for argument in Court.

Mr. Rogers, for Mr. *Bayley*. A vendor of an estate retains, in equity, a lien on the estate for the consideration money, until it has been fully paid, or the right has been waived or abandoned, of which there must be clear evidence. The principle is distinctly stated in *Hughes v. Kearney* (a). "Purchase-money unpaid is *prima facie* a lien on the lands sold; and if a security is taken for that money, it lies on the vendee to shew that the vendor agreed to rest on that security, and to discharge the lands." "The circumstance that, in these cases, the money is secured to be paid at a future day, does not affect the lien;" *Winter v. Lord Anson* (b); there the purchase-money was not payable until after the death of the vendor. The present case is precisely similar to *Tardiff v. Scrugan* (c), where it was held, that the vendor of an estate, in consideration of a life annuity, did not lose his lien on the land, by taking a bond from the purchaser for securing the annuity. In *Remington v. Deverell* (d), the Defendant had agreed to purchase

(a) 1 Sch. & Lef. 132.
(b) 3 Russell, p. 490, overruling 1 Sim. & Stu. 434.

(c) Cited in *Blackburn v. Gregson*, 1 Bro. C. C. p. 423.
(d) 2 Anst. 550.

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purchase an estate from the Plaintiff for a life annuity, and the Court held the vendor entitled to have it charged upon the purchased estate. The same was held in *Ker v. Cloberry* (a). *Clarke v. Royle* (b), which will be cited, was decided on *Winter v. Lord Anson*, and it does not appear to have been observed that that case had been reversed. He also referred to *Bower v. Cooper* (c), and *Frail v. Ellis* (d).

Mr. Lloyd and Mr. J. H. Taylor, for Mr. Fluher. There is no lien on the estate. This case differs entirely from those in which there is a money consideration, for which a collateral security is given. Here the terms of the agreement are specified, upon the conveyance "to grant an annuity of 50*l.* per annum, &c., to be secured by bond." The bond being given, the vendor has all he contracted for, and the matter being complete he retains no lien. Although there has been no conveyance, the matter must be now treated as if the vendor were coming for specific performance; in that case, the Court would direct a bond to be executed in the terms of the contract, and a conveyance by the vendor *in consideration of the bond so given*. The cases of *Clarke v. Royle* (b) and *Buckland v. Pocknell* (e) are in point. In *Clarke v. Royle*, A. conveyed an estate to B., in consideration of B. entering into the covenants contained in the deed for paying an annuity to A., and 3,000*l.* to certain persons in the event of his B.'s marrying; it was held, that the covenants did not create a lien on the estate.

In *Buckland v. Pocknell*, A. agreed to sell an estate to B. for an annuity, and B. was to pay off a mortgage to

(a) Vice-Chancellor, *March*
 27, 1819, MS., referred to in 1
Sugd. Vend. (10th edit.) 313.
 (b) 3 *Sim.* 499.

(c) 2 *Hare*, 408.
 (d) 16 *Beav.* 350.
 (e) 13 *Sim.* 406.

to which the estate was subject. Accordingly *B.* executed a deed, by which he granted the annuity to *A.*, and covenanted to pay it, and by a conveyance of even date, but executed after the annuity deed, after reciting the agreement and the annuity deed, *A.* and the mortgagee, in pursuance of the agreement, and in consideration of the annuity having been so granted as aforesaid, and of the payment of the mortgage money, conveyed the estate to *B.* The annuity afterwards became in arrear; it was held, that *A.* had no lien on the estate for the annuity.

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The rights of Mr. *Fluker* have been settled by the decree, the declaration in which is inconsistent with what is now asked.

Mr. *Rogers*, in reply.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

Nov. 13.

I am of opinion, in this case, that the contract made between the parties excluded the lien on the estate for the payment of the annuity. There is a great number of decisions relating to this question of the lien upon the estate for unpaid purchase-money, and there certainly is a great discordance in the authorities; but I think it unnecessary to refer to them in detail. There are three decisions of a later date, which have been confidently referred to as relating more particularly to this subject, but they do not appear to me to be inconsistent with each other or with the opinion I have to express on this subject. The cases are *Winter v. Lord Anson* (a),
Clarke

(a) 3 Russ. 488.

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Clarke v. Royle (a), and *Buckland v. Pocknell* (b), and I think they are all reconcilable. The effect of them is this:—that it depends upon the terms of the contract entered into between the parties, whether a lien does or does not exist upon the land in respect of the unpaid purchase-money. The case of *Buckland v. Pocknell* appears to me to be very near the present. There, an equity of redemption was sold, in consideration of two annuities which were granted and covenanted to be paid, by a deed of even date with the conveyance. The conveyance was expressed to be made in consideration of the annuity so granted, and of the mortgage debt having been paid by the purchaser. It was held, that there was no lien.

It appears to me that the mode of carrying the contract in the present case into effect is this:—by a separate and independent instrument the vendor should convey the land, and in consideration of that conveyance the purchaser should secure the annuity by his bond. In the case of *Buckland v. Pocknell* exactly the same thing had been done. The contract is, that an annuity shall be granted, and shall be secured by bond, in consideration of which the estate shall be conveyed. The whole of this and the acts of the parties appear to me to shew that the construction of the contract is to discharge the land from the lien, the existence of which would render it almost unsaleable in the hands of the purchaser. I am of opinion, that the proper mode of dealing with the decree which I have made, directing a security to be prepared, is to give a bond, and not a mortgage of the estate, to secure the annuity. If it had been intended that a mortgage should be given, the order would have so directed, but the order appears to me to exclude it.

This

(a) 3 Sim. 499.

(b) 13 Sim. 406.

This result does not appear to me to militate with the case of *Winter v. Lord Anson*, nor do I dispute the authority of that case. In fact both the cases of *Clarke v. Royle* and *Buckland v. Pocknell* are distinguished from that, and one of the grounds on which the Vice-Chancellor of *England* went, in *Buckland v. Pocknell*, was, that it would be quite inconsistent with the mode in which the parties had dealt, to say that there should be a lien for the purchase-money during the lives of the annuitants. The lien was held to be excluded in that case, and here, I think, that the lien is excluded.

The question was really determined by my decree, but I thought it was desirable, in this case, to treat the matter as open and reconsider it.

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DIXON
v.
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1855.

DAVIS v. EARL OF DYSART. (No. 2.)

Nov. 5, 17.

A bill by an incumbrancer of an alleged remainderman against the tenant for life for production of the title-deeds, and involving questions of title, was dismissed with costs. Upon the taxation, a charge was made for an abstract of title-deeds.

Held, that the word "abstract" was intentionally omitted from the 120th General Order of May, 1845, and that the charge for the abstract could

not be allowed, if it exceeded that of a copy of the documents; secondly, that no such charge could be allowed for an abstract made before the suit, though with a view to an arrangement between the same parties; but thirdly, that a copy of it for the use of the Counsel who prepared the answer might be allowed.

Fees to two junior Counsel (one of them being a Conveyancer only) to settle the answer, cannot be allowed as between party and party, unless by special order of the Court.

A charge for abbreviating the answer, estimating it at its total length, including schedules, is proper, and to be allowed on a taxation between party and party.

Where, by arrangement, exceptions to an answer were heard with the cause, a charge for consultation between Counsel on the exceptions, as distinct from the consultation on the hearing of the cause, was allowed.

A charge for copies only of those parts of the interrogatories, the answers to which were excepted to, can be allowed for the purposes of the consultation on the exceptions, as distinct from the copies made for the purpose of preparing the answer; for which latter purpose, also, only one copy to one junior counsel can be allowed.

Upon a taxation between party and party, the bill of costs may be added to or varied after it has been brought into the office, at any time before the taxation is concluded; but the practice is different upon a taxation under the Solicitors' Act.

THE bill in this case was filed for the simple purpose of compelling the production by the Defendant (who was alleged to be mere tenant for life) of certain title-deeds, for the examination and inspection of the Plaintiff, (an incumbrancer of the alleged remainderman,) and for the delivery of copies and abstracts of the documents. Exceptions were taken to the Defendant's answer, and, by arrangement, the exceptions came on to be heard together with the cause. The exceptions were overruled, and the bill dismissed with costs, to be taxed and paid by the Plaintiff to the Defendant (a).

The Defendant's bill of costs was taxed at 410*l*. The Plaintiff carried in objections before the Taxing Master to the taxation, and to the allowance by him of the following items, viz., a charge of 60*l*. 13*s*. 4*d*. for drawing

(a) 20 *Beav.* 405.

drawing an abstract of Defendant's title deeds, and of 60*l.* 13*s.* 4*d.* for making two copies for Counsel thereof, and of opinions of various Counsel on the title; also a charge for making two copies of the interrogatories and other papers to be laid before Counsel for preparing the answer; also fees, &c. to two junior Counsel, employed to settle the answer and attendances; also the increase from 6*l.* 3*s.* 8*d.* to 13*l.* 3*s.* 8*d.* of the item for abbreviating the answer, by estimating it at its total length, including the schedules, and this after its being brought into the office; and, lastly, for consultation with reference to the exceptions to the answer.

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The Taxing Master overruled all the objections, and appended to his certificate of taxation a list, with his reasons for disallowing them. As to the charges for preparing the abstract, making the copies necessary for the Defendant's defence and answer to the suit, and the employment of two junior Counsel to settle the answer, the Taxing Master said, he conceived that the Orders of the 8th of May, 1845 (a), gave him a discretion as to such costs, and thinking them properly and necessarily incurred, looking to the nature of the suit, he had allowed them. As to two copies of the interrogatories for the use of Counsel, those copies were also used on the argument of the exceptions, and were necessary for that purpose and also for settling the answer. He said that as no close copy had been allowed, which was a usual charge, he had allowed them. The increased charge for abbreviating, and also the charge for copying the answer, were the usual charges, and therefore allowed. The charges for consultation on the hearing of the exceptions he had also allowed, as proper and usual. From this finding the Plaintiff appealed.

The

(a) *Ordines Can.* 333.

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The words of the 120th Order of the 8th of *May*, 1845, are as follows:—"Where costs are to be taxed as between party and party, the Taxing Master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in," (among other things,) "advising with Counsel on the pleadings, evidence, and other proceedings in the cause; procuring Counsel to settle and sign pleadings, &c. . . . supplying Counsel with *copies of or extracts from* necessary documents. But in allowing such costs, the Taxing Master is not to allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice or for defending his rights, or which appear to have been incurred through over caution, negligence or mistake, or merely at the desire of the party."

As to the preparation of the abstract, it appeared that before the suit had been instituted, there had been a negotiation between the parties with reference to the production of the title-deeds and the delivery of an abstract, and an abstract had been laid before Mr. *Measure*, a Conveyancer, for his opinion as to the propriety of such production and delivery; but the negotiation having gone off, and the present suit having been instituted, the Defendant's answer was settled by Mr. *Measure*, in conjunction with an equity draftsman, and copies of the abstract and of the other papers were laid before each.

As to the preparation of the abstract, there was an affidavit by Mr. *Samuel Hooper*, clerk to the Defendant's solicitor, in the following words:—"I personally superintended the management of this suit on behalf of the above-named Defendant, and in particular the preparation,

(a) *Ordines Can.* 333.

ration of the abstract of title laid before Counsel on behalf of the said Defendant, for the purpose of enabling them to prepare the answer to the bill filed by the above-named Plaintiff in this cause, and that the preparation of such abstract of title (being the same abstract as is mentioned in the bill of costs of the said Defendant in this cause) was commenced on or about the 30th day of *May*, 1854, at which time an arrangement was pending for supplying the Plaintiff, at his own expense, with such abstract of title, without suit, but such arrangement was not carried out, and the above-named Plaintiff filed his bill of complaint in this cause, when such abstract of title was completed, and used for the purpose of preparing the answer of the Defendant, as before mentioned, and such abstract of title was not prepared for any other purpose or occasion whatever than that before mentioned."

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Mr. R. Palmer and **Mr. Jessel**, for the Plaintiff. The charge for the abstract of title ought not to be allowed; it does not come within the 120th Order of *May*, 1845, for, by that order, the costs only "of copies or extracts from necessary documents" are to be allowed, and those words do not include an "abstract," and that is the only Order allowing the charge. Besides, the abstract was prepared before the suit was instituted, and not really and *bonâ fide* for the purposes of it, and for that reason was not chargeable. But though the charge for preparing the abstract was improper, a fair copy of it for Counsel to prepare the Defendant's answer was properly charged, but not two copies, nor in fact any charge connected with the employment of a Conveyancing Counsel, who was not engaged in the cause. It is the first time that a charge for consultations, &c., with Counsel not retained in the cause has ever been heard of, and the charge cannot be sustained.

In

CASES IN CHANCERY.

Green v. Briggs (a), the costs of more than two Counsel disallowed on taxation between party and party, notwithstanding the third Counsel was retained after counsel by whom the pleadings had been drawn been called within the bar. And the same rule laid down in *Smith v. The Earl of Effingham* (b). When the copies of the interrogatories used in the consultation on the exceptions were unnecessary, and neither they nor the fee for consultation on the exceptions, as distinct from the cause, ought to be allowed. As to the increased fee for abbreviating the answer, such a thing is quite inadmissible after the bill has been brought into the office. They cited *Re Catlin* (c).

Mr. Lloyd and Mr. Tripp, for the Defendant. The principle is, that the person who is in the wrong ought to indemnify the opposite party from all the costs which have been occasioned by the litigation, and it was in order to effect this object, that the 120th General Order was made. A liberal construction ought, therefore, to be given to this General Order, especially in a case like the present, which is a mere fishing bill by a stranger, seeking to disturb the Earl *Dysart* in the possession of his family estates. The General Order is quite extensive enough in its terms to include all the costs which have been incurred by the Defendant, and gives to the Master a wide discretion. The costs were "necessary and proper" for defending the rights of the Defendant; the case was peculiar, involving intricate questions, which rendered it necessary to examine the title with the best professional assistance.

The rule of the Court is settled, that this Court will not interfere with the discretion of the Taxing Master, on

(a) 7 *Harc.* 279.

(b) 10 *Beav.* 378.

(c) 18 *Beav.* 508.

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on a mere question of the *quantum* of charges ; there must be some principle involved to induce the Court to do so ; *Alsop v. Lord of Oxford* (a). The cases of *Wastell v. Leslie* (b) and *Downing College Case* (c), were referred to.

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Mr. R. Palmer, in reply.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

Nov. 17.

This is an appeal from the taxation of a bill of costs by one of the Taxing Masters, the bill in the cause having been dismissed with costs.

The first item complained of is an item of about 60*l.* for drawing an abstract of certain documents which were required for the Defendant's answer. The question is the propriety of the amount the Master has allowed. The amount in the bill charged was 79*l.* 6*s.* 8*d.*, and the Master has diminished the number of brief sheets by his mode of calculating.

This depends on the 120th Order of the 8th May, 1845 (d). The words of the Order are these:—"Where costs are to be taxed as between party and party, the Taxing Master may allow to the party entitled to receive such costs, all such just and reasonable expenses as appear to have been properly incurred in" (I pass over those that do not relate to this) "supplying Counsel with copies of or extracts from necessary documents." The word "abstract" I have reason to know, at least I have

(a) 1 *Myl. & K.* 564.

(b) 14 *Sim.* 184.

(c) 3 *Myl. & Cr.* 474.

(d) *Ordines Can.* 333.

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have been so informed by extremely good authority since this case was heard, was purposely omitted from the Order, in order to avoid the extra price of 6s. 8d. per sheet being obtained, instead of 3s. 4d., which would be the price allowed for a copy. At the same time, if a solicitor who might have copied at length a large number of documents, and might have charged 3s. 4d. per sheet for them, has omitted to do so, but, in lieu thereof, has prepared an abstract of less than half the size, and at less expense than would have been incurred by making copies of the documents, I should think, that on the taxation of costs, this might properly be allowed, because, in point of fact, there is a benefit derived to the parties by it. But in either case, the documents in question must be prepared for the purpose of the suit, and whether this was so or not in the present case depends on the affidavits of Mr. Hooper, the clerk of the solicitor of the Defendant, who has put in a very full affidavit stating how the matter stood. The passage which refers to this matter is this:—"I personally superintended the management of this suit," &c. (a).

Now I think, upon this statement, that the abstract cannot be said to have been prepared for the purpose of the answer. It was, in point of fact, prepared before the suit, and with a view to an arrangement, although arising out of the same matter and between the same parties, and I think that the Order confines the allowance to such documents only as are prepared really *bonâ fide* for the answer. Certainly, if it were done for a totally distinct purpose some time before, no one could reasonably contend that it could be charged, and also, if done in respect of a question between the same persons, but on a distinct occasion. I think that,

entit

(a) See the passage, *ante*, p. 126.

entitle it to be charged, it must be done *bonâ fide* for the purposes of the answer, and that this was not so in the present case, as it appears in fact to have been prepared before the bill was filed. The copy of it, for the Counsel who prepared the answer, is proper and must be allowed.

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The next question is, the propriety of the allowance of two junior Counsel to settle the answer of the Defendant, Lord *Dysart*. Mr. *Measure*, a Conveyancer of eminence, had been consulted by Lord *Dysart* on the subject of his title, and also as to what documents might be produced and what not; it was therefore a matter of importance to Lord *Dysart*, that the advice and assistance of Mr. *Measure* should be obtained in the preparation of his answer. Mr. *Measure*, however, not being in the habit of practising in Court as an equity draftsman, it required that some other gentleman should be employed as junior Counsel. This is certainly a very good reason why, for Lord *Dysart's* satisfaction, two Counsel should have been employed on this occasion, but, in my opinion, it affords no reason for charging it against the Plaintiff. In every case, it might be a satisfaction to the Defendant to have the united assistance of two Counsel to prepare his pleadings, and I see no circumstances of peculiar difficulty or intricacy in this case which requires the assistance of two Counsel for the performance of those duties which are almost invariably performed by the junior Counsel alone. It is, in fact, the introduction of a third Counsel in the case, for certain parts of the suit, and I am unable to discover any grounds on which I could refuse to allow this in the great majority of cases, if I were to allow it in the present instance.

As a general rule two Counsel are allowed, a junior
K 2 and

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and a senior; where more are allowed, it is an exception to the general rule. So the preparation of the answer by two Counsel is an exception to the general rule, and in my opinion, the sanction of the Court should be obtained for this *extra* assistance, before it can properly be allowed by the Taxing Master in a question between party and party. It is the Court alone that is able to judge of the propriety of this *extra* assistance being charged, inasmuch as it has before it all the details of fact and the points of law which are raised and discussed, on which it has had to form and pronounce an opinion.

In my opinion, therefore, all that portion of this bill of costs which has been occasioned by the employment of Mr. *Measure*, however proper as regards Lord *Dysart* cannot properly be charged as between party and party against the Plaintiff, and it must be omitted from the bill.

The fee for abbreviating the answer by estimating the answer at its total length, including the schedules, I find on inquiry, is the regular and legitimate charge. This therefore, is right, and ought to be allowed. I may also observe, that the Master is right in allowing the bill of costs to be altered for this purpose. The bill of costs as between party and party, is always susceptible of being added to or varied, after it has been brought into the office. In this respect, it is quite different from a bill of costs taxed under the statute, where an alteration cannot be made as against the client, except with his consent, after the bill has been brought in for taxation. In cases of taxation of costs, as between party and party the bill of costs is analogous to a mere state of facts and is a claim by one party against another party to suit, and it may be amended, in any way and at any time

time, before the taxation is concluded. This has been the invariable practice, as I am informed on inquiry.

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With respect to the remaining items, I think that a consultation on the exceptions, between the Counsel, was proper and ought to be allowed, distinct from the consultation on the cause, although, by arrangement, the exceptions stood over to come on with the hearing of the cause. I do not understand correctly whether copies of interrogatories are charged for in this consultation as distinct from the copies made for the purpose of the preparation of the answer. It appears to me, that such is the case, if so, then my opinion is, that only copies of the interrogatories to those answers which were excepted to can be allowed for this purpose; and as I have already stated with respect to the employment of a third Counsel, one copy only ought to be allowed in the preparation of the answer.

In all other respects, the taxation of the Master, on the matters complained of, appears to me to be correct. There must, therefore, be an order to review the taxation in the matters mentioned, and no costs on either side. Probably after the statement I have made it will not be necessary to send the bill back to the Master, but it may be moderated by the solicitors on both sides, who will easily be able to arrange it, after what I have stated as my view of the case.

NOTE.—An appeal to the Lords Justices was dismissed on the 26th of January, 1856.

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Nov. 9, 10,
19.

PHILPOTT v. ST. GEORGE'S HOSPITAL.

The doctrine of
Trye v. The
Corporation of
Gloucester
(14 *Beav.*
173) adhered
to.

A testator
devised eight
acres at N. to
B., and he
directed, that
if any person
should, within
twelve months
from his death,
give a suitable
piece of land
in N., as the
site of alma-
houses, his
executors
should pay to
the trustees
60,000*l.*, to be
devoted to the
purposes of
the charity.
B., who was
an executor,
devoted the
eight acres to
the charity.
Held, that the
bequest of the
money was
void, as con-
trary to the
policy of the
Mortmain Act.

THE question, in this case, arose on the construction of a bequest contained in the will of Earl *Beauchamp*, dated in 1847. By this will, after devising eight acres of land in *Newland* to his nephew, *Charles G. Scott*, in fee, the testator proceeded in these words:—

“And whereas I have contemplated erecting and endowing almshouses, either upon some part of my estate or elsewhere in the hamlet of *Newland*, aforesaid, for the residence of twelve or some larger number of poor men and women, members of the Church of *England*, who shall have been employed in agriculture and have been reduced by sickness, misfortune or infirmity. Now, in case I should happen to die without effecting such object, and any persons or person should, within twelve months after my decease, at their, his or her expense, purchase or give a suitable piece of land, in *Newland* aforesaid, as a site for such almshouses, and with the intent that the same should be devoted to such purpose, then I empower and direct the trustees or trustee for the time being of this my will, when and so soon as such land shall have been legally dedicated to charitable uses, (provided they or he shall approve the scheme of the intended charity and the rules and regulations

A testator, in case any person should give a suitable piece of land for almshouses, gave a sum of money to be devoted to the charity, with a gift over of the fund, if no such piece of land should be provided or the scheme should not be approved of by his trustees. The land was provided, and no difficulty interposed as to the scheme, but the gift of the money was held void as contrary to the policy of the Mortmain Act. Held, that the gift over did not take effect.

regulations proposed for the government thereof,) to pay to the trustees of the said intended charity, out of such part of my personal estate as is hereinafter mentioned, the sum of 60,000*l.*, to be by them devoted to the several purposes of the said charity, in the manner to be determined in respect of the funds of the same, but so nevertheless, that the said sum or any part thereof shall not be applied in or towards the purchase of any lands for the purposes of such charity. And if and in case no such piece or parcel of land shall be found and provided as aforesaid, or being such, the scheme of the intended charity or the rules and regulations for the government thereof shall not, in the opinion of the majority of my said trustees, be in accordance with what they may consider my wishes upon the subject to have been, then I give and bequeath the said sum of 60,000*l.* to the trustees for the time being of *St. George's Hospital*, to be by them applied for the purposes of that institution."

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Hospital.*

The testator died in 1853, and his will was proved by his executors, *Charles G. Scott, Susan Kitching* and the Plaintiff, the Rev. *Thomas Philpott*.

By indenture, dated the 6th of *December*, 1855, and duly enrolled, *Charles G. Scott*, after reciting the will, and that *Charles G. Scott* "was desirous of effectuating the object contemplated by" the testator, conveyed the eight acres in *Newland* to *John Abel Smith, Susan Kitching*, and *Thomas Philpott* and their heirs, upon trust, that it "should thenceforth be devoted to the purposes and be used as a site for the erection of such almshouses, as in the said will of the Earl *Beauchamp* mentioned, and other the purposes of the said intended charity, and that the same should be used and enjoyed for those purposes, and be subject to such powers

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 Hospital.

powers and provisions in relation thereto, and that the scheme of the said intended charity, and the rules and regulations for the government thereof, should be framed and settled in such manner, in all respects, as *John Abel Smith, Susan Kitching* and *Thomas Philpott* should, with the approbation of the trustees of the testator's will, thereafter determine, and should by any indenture enrolled in Chancery direct and declare accordingly."

This bill, filed by Mr. *Philpott* against the Governors of *St. George's Hospital*, and the three trustees, prayed that the rights and interests of all parties to the 60,000*l.* might be declared.

The first question which arose was, whether the gift of 60,000*l.* to a charity, in case of any person giving a suitable piece of land for the site, was valid, or contrary to the policy of the Statute of Mortmain; and secondly, assuming the gift to the charity failed, then whether the gift to *St. George's Hospital* had or had not, in the event which had happened, taken effect.

The Solicitor-General (Sir *R. Bethell*) and Mr. *Giffard*, for the Plaintiff, admitted that this case could not be distinguished from *Trye v. The Corporation of Gloucester* (a). On this point see *Cawood v. Thompson* (b); *Edwards v. Hall* (c); *Longstaff v. Rennison* (d); *The Church Building Society v. Barlow* (e); *Attorney-General v. Whitchurch* (f); *Attorney-General v. Hull* (g).

Mr. *Lloyd* and Mr. *Cairns*, for the residuary legatees.

The

(a) 14 *Beav.* 173.

(b) 1 *Smale & G.* 409.

(c) 11 *Hare* 1, since affirmed.

(d) 1 *Drewry*, 28.

(e) 3 *De Gex, M. & G.* 120.

(f) 3 *Ves.* p. 144.

(g) 9 *Hare*, 647.

The gift over to *St. George's Hospital* fails, and the 60,000*l.* falls into the residue. The Hospital is only to take "in case no such piece or parcel of land shall," within twelve months, be given. Here a valid gift of the land has been made by Mr. *Charles G. Scott*. The land has been devoted to the charity by legal and effectual means, and the condition, on the non-performance of which alone there is a gift over, has been performed.

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 Hospital.

Secondly, this is not a gift over in case of failure of the charitable intent by reason of its illegality, but on a failure arising from the non-dedication of suitable piece of land to establish it. It is like the case of the *Attorney-General v. Hodgson* (a), where personal estate was given for an establishment or institute of a charitable receptacle, if the same could be done, with a gift over "if no such institute could be conveniently established." The first gift being held void under the Statute of Mortmain, the Vice-Chancellor of *England* held, that the gift over had not taken effect, for the testator pointed to some physical impediment and not to the invalidity under the Statute of Mortmain. The gift over is inserted for similar objects to those in *Attorney-General v. Tyndall* (b), as to which gift over the Court said, "I am clear that it is a fraudulent and void clause; it is inserted as a means to intimidate the heir at law and the next of kin, and prevent their opposing the charity."

Mr. *R. Palmer*, Mr. *Bagshawe*, and Mr. *Hawkins*, for the trustees of *St. George's Hospital*, argued, that the true effect of the will was to give over the legacy in case of the failure, by any means, of the first charitable intention. That the *Attorney-General v. Hodgson* had

(a) 15 *Sim.* 146.

(b) 2 *Eden*, p. 214; *Ambler*, p. 615.

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had been decided on demurrer, and that there was no allegation in the bill which enabled the Court to deal with the second alternative gift.

The cases of *Attorney-General v. Whitchurch* (a); *De Themmines v. De Bonneval* (b); *Tulk v. Houlditch* (c); *Poor v. Mial* (d); *Harrison v. The Corporation of Southampton* (e); *Attorney-General v. Bishop of Oxford* (f); *Brodie v. Chandos* (g); *Cherry v. Mott* (h); *Corbyn v. French* (i); *Pearsall v. Simpson* (k), and 1 *Swinburne on Wills* (l) were also cited.

Mr. Lloyd in reply.

The MASTER of the ROLLS. I will consider this case.

Nov. 19. The MASTER of the ROLLS.

The first question which arises in this bequest is, whether it is valid, having regard to the Statute of Mortmain.

The Plaintiff's Counsel admitted that they could not distinguish this case from *Trye v. The Corporation of Gloucester*, decided by me (m), and on my stating that my opinion on the subject remained unchanged, they forbore to argue that part of the case. I have, however, reconsidered my judgment in that case, and I think it proper to observe, that the further consideration which

I have

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| (a) 3 <i>Ves.</i> 144. | (g) 1 <i>Bro. C. C.</i> 444, n. |
| (b) 5 <i>Russ.</i> 288. | (h) 1 <i>Myl. & Cr.</i> 123. |
| (c) 1 <i>Ves. & B.</i> 248. | (i) 4 <i>Ves.</i> 431. |
| (d) 6 <i>Mad.</i> 32. | (k) 15 <i>Ves.</i> 29. |
| (e) 2 <i>Smale & G.</i> 387. | (l) Part 4, s. 6. |
| (f) 1 <i>Bro. C. C.</i> 444; 4 <i>Ves.</i> | (m) 14 <i>Beav.</i> 173. |
- 421.

I have given to that case confirms me in the view that I then expressed, and I have the satisfaction of finding that the Vice-Chancellor Sir *William Page Wood* has come to a similar conclusion in the case of *Dunn v. Bownas* (a). I therefore think it sufficient, on that part of the case, to refer to my judgment in the case of *Trye v. The Corporation of Gloucester*, and to state my opinion, that the bequest in the present will to found almshouses fails, by reason of the existing law of the land, which has rendered it impossible to carry the testator's wishes into effect.

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The substantial question which then arises before me, and on which I have reserved my judgment, is, whether, in this state of circumstances, the gift to *St. George's Hospital*, which, standing by itself, is free from all objection, takes effect; or, in other words, whether the event has arisen on which the gift over is directed to take effect.

I think it material to refer to these words again, they are these:—"If and in case no such piece or parcel of land shall be found and provided as aforesaid, or being such, the scheme of the intended charity or the rules and regulations for the government thereof shall not, in the opinion of the majority of my said trustees, be in accordance with what they may consider my wishes upon the subject to have been, then I give and bequeath the said sum of 60,000*l.* to the trustees for the time being of *St. George's Hospital*."

When I first read these words, my impression was very strong, that the meaning of them was, that if the first object failed, from any cause whatever, the gift to
St. George's

(a) 1 *Kay & Johns*. 596.

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 Hospital.

St. George's Hospital took effect, and that the failure to supply the land for the almshouses might arise as well from the operation of law, as from the want of inclination on the part of any person to give a suitable piece of land in *Newland* as the site of the almshouses. The further consideration of the subject and the arguments of Counsel have convinced me, that I too hastily expressed and too hastily came to that conclusion.

In the case of the *Attorney-General v. Hodgson* (a), the Vice-Chancellor of *England* points out the principles on which, in his opinion, such gifts over are to be construed. That case was of this description:—The testator bequeathed personal estate, “in trust for the establishment or institution of a charitable receptacle, if the same could be done, for twenty-seven poor old men of *England* and the same number in *Ireland*, to be under the management of the Roman Catholic Bishop of *London* and the Roman Catholic Bishop of *Dublin*; but if (said the testator) no such institution can be conveniently established, I request that the same may be disposed of in charitable donations, to persons of the same description, of 6*l.* each, and whenever an opportunity offers, that it may be added to any contribution for a similar purpose, 30*l.* of which sum I give to each of my executors.” The Vice-Chancellor of *England* was of opinion, that the events had not arisen on which the gift over took effect. He observes, “the testator says, but if no such institution can be conveniently established, not at all contemplating, as it strikes me, the contingency that the law might not permit the thing to be done, but evidently pointing to some impediment of a totally different kind.” Having read through the whole of the judgment very carefully, and having reconsidered the whole

(a) 15 *Sim.* 146.

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whole of the comments of counsel upon it, I am of **opinion**, that the Vice-Chancellor decided that case **upon** the ground stated in that clause of his judgment. **In fact** it turned upon the word "convenient;" if that **had** been omitted, the gift over would probably have **been** good, but the gift over was to take effect only **in the** event of the previous gift failing, by reason of its **not** being "convenient" to carry it into effect.

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Now, on looking at the present case, it appears to **me** to be still more strongly marked than in the *Attorney-General v. Hodgson*. The gift to *St. George's Hospital* is either if no such piece of land "shall be found and provided," or if the scheme or the rules shall **not** be, in the opinion of his trustees, "in accordance with what they may consider his wishes on the subject." It ignores altogether any difficulty which might **arise** on the ground that the law might interpose an **obstacle**; it does not deal with that case at all. The **clause** seems, in truth, to be introduced in the nature of a clause *in terrorem*. He says, in substance, "I require you, my trustees, to do all you can to carry this gift of **mine** into effect, but if you do not, and if there be any **default** made in respect of it, then nobody shall have any benefit from it; but, in that case, I desire that it shall go over to *St. George's Hospital*." Now no **default** has been made by any one; all that can be done **has** been done by the persons entrusted by the testator to carry his wishes into effect. In fact, the land has **been** procured and the rules of the Hospital have been **approved**; I am not sure that this approval distinctly **appears** in evidence, but if that were not so, it would be a mere question for an inquiry, so that I assume, **that** everything has been done that can be done. Then **the** difficulty which arises is this:—the land has been **given**, and the rules approved, but the law interposes and

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and prevents it from being carried into effect. It interposes in this way; not by saying that the conveyance of the land is not legal, for it is perfectly legal and valid; neither does it say that the rules are improper, no difficulty of that sort arises; but the law interposes by saying, "It is true you have given the lands, it is true you have approved of the rules, but for the purpose of accomplishing this object, the legacy itself shall not be given at all, and in fact does not exist;" (I am here assuming, as the foundation of my judgment, that my opinion in the case of *Trye v. Corporation of Gloucester* is correct.) This, then, is certainly not the difficulty contemplated by the testator. He did not contemplate that any difficulty would arise, if a suitable piece of land were provided and legally conveyed, and if the rules were approved of; and the gift over was only to take effect, in case of a failure of the land being given and of the rules being approved of, and there is no gift over in case of a defect arising from the law interposing and saying that the legacy shall not be given for such a purpose.

I am, therefore, of opinion that the event on which the gift over to *St. George's Hospital* was to take effect has not arisen, and that consequently, the whole of the legacy fails, both the original gift and the gift over. The result of which is, that I must make a declaration to that effect.

I think it very probable, considering the nature of this case, that it may not rest here, but I wish that my view of the will may distinctly appear, which is this:—that the original gift fails, by reason of its being contrary to the Statute of Mortmain, and that the gift over fails, by reason of the events, on which that gift over is directed to take effect, not having arisen.

NOTE.—An appeal to the House of Lords is pending.

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ABBOTT v. MIDDLETON.

Nov. 15, 2:

IN 1834, General *Carpenter*, while at the *Cape of Good Hope*, made his will, by which he bequeathed to his wife an annuity of 2,000*l.* a year for life, and directed a particular fund to be set apart for securing it. He proceeded to express himself in the following terms: —“And on her decease, the sums provided and set apart for such payment to become the property of my son *George Carpenter* (now captain in his majesty’s 41st regiment of foot), so far as he the said *George Carpenter* my son shall receive the interest on such sum during his life, and on his demise, the principal sum to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will and direct. But in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters, the deceased *Jane Ricketts* and *Mary Paxton*, and of my now surviving daughter *Eliza Middleton* (should she leave any issue), in equal portions to each.”

In construing a will words may be supplied, changed and transposed, whenever the context requires it.

Bequest to testator’s widow for life and on her decease, to his son for life, and on his demise the principal to become the property of any children he might leave. The testator followed a gift over in case the son died before his mother (omitting the words “without leaving children.” The son predeceased both his father and his mother, leaving an only child, who survived the testator. Held that such child was entitled to the principal sum after the grandmother’s death; and that to effect the intention of the testator, the words “without leaving any child” must be supplied after the word “dying.”

The testator then gave his daughter *Eliza Middleton* one lac of rupees for life, and the principal, on her demise, to descend to any children she might leave. He then gave a lac of rupees to the children of his deceased daughter *Jane*, and another lac to the children of his deceased daughter *Mary*. He appointed his son *George Carpenter* residuary legatee “to all further property

to the intention of the testator, the words “without leaving any child” must be supplied after the word “dying.”

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perty as might not be disposed of in this document," and appointed his wife and son executors.

George Carpenter, the son, was killed at the Battle of *Inkermann* on the 5th *November*, 1854, leaving *George William Wallace Carpenter*, an only child, an infant, surviving. The testator died in *January*, 1855 and his widow died on the 20th *September*, 1855. The question was, whether the son of Captain *Carpenter* was, under these circumstances, entitled to the fund provided for securing the widow's annuity.

Mr. *R. Palmer* and Mr. *Bird*, for the Plaintiffs, & daughter of Mrs. *Paxton* and her husband and their trustees. The gift over has taken effect. The only passage of the will as to which there is any question is this:—"but in case of my son dying before his mother then and in that case the principal sum to be divided between the children of my daughters." These words are clear and unambiguous, and the Court cannot change them by introducing other words. They referred to *Tarbuck v. Tarbuck (a)*.

Mr. *Lloyd* and Mr. *Goldsmid*, for some of the children of the testator's daughters, and

Mr. *Roupell* and Mr. *G. M. Giffard*, for other children, contended that the gift over took effect in the event which had happened of the son dying in the mother's lifetime. They cited *Andree v. Ward (b)*; *Greene v. Ward (c)*; *Cooper v. Pitcher (d)*; *Penley v. Penley (e)*; *Ranelagh v. Ranelagh (f)*; *Addison v. Bush (g)*; *S. C., Lee v. Bush (h)*; *Spalding v. Spalding*

(a) 2 *Jarm. Wills*, 375 (1st ed.)

(b) 1 *Russ.* 260.

(c) *Id.* 262.

(d) 4 *Hare*, 485.

(e) 12 *Beav.* 547.

(f) *Id.* 200.

(g) 14 *Beav.* 459.

(h) 2 *De G., M. & G.* 810.

ing (a); *Denn d. Radclyffe v. Bagshaw* (b); *Holmes v. Cradock* (c); *Parsons v. Parsons* (d); *Shuldham v. Smith* (e); *Cross v. Cross* (f).

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Mr. Follett and Mr. Kinglake, for Mrs. Middleton.

The *Solicitor-General* (Sir Richard Bethell), Mr. Cairns, and Mr. R. A. Bethell, for G. W. W. Carpenter, the testator's grandson. At the date of the will, the testator's son was unmarried, and it was made by the testator himself. As it stands, it is repugnant and inconsistent, and the words "without leaving any child" after "dying" must be implied, in order to give it a rational meaning, and carry out the testator's intention. The true grounds on which the implication proposed to be made is founded are these:—you must imply words to effectuate the plain and real intent of the testator, which must be ascertained from the construction of the whole will. The words in the previous clause of the will are, "on his demise, the principal sum to become the property of any child or children he may leave." Those words mean "demise" at any time, whether he survived his mother or not. Down to this passage the children take the property, and the *onus* is then on the other side, to shew that the interest thus given was afterwards taken away. Great stress has been laid upon the word "but," which, it was argued, was conclusive to alter and take away what would otherwise have been a vested interest in the children of the son. This, however, is used in connection with a gift to children, and the testator had them in contemplation, and for that very reason the words which are required must be implied. The testator speaks of his son's children,

(a) *Cro. Car.* 185.
(b) 6 *T. R.* 512.
(c) 3 *Ves.* 317.

(d) 5 *Ves.* 578.
(e) 6 *Dow.* 22.
(f) 7 *Sim.* 201.

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children, but then it occurs to him that he may die and leave none, while the property is reversionary; in that case he substitutes his daughters' children. There is therefore good ground for holding, that the words "without leaving a child" are to be implied after the word "dying," in order to reconcile both parts of the bequest, and give a rational effect to the whole; the authorities fully support this view of the case, and justify the implication contended for. *White v. Barber* (a); *Doe d. Leach v. Micklethorp* (b); *Kirkpatrick v. Kilpatrick* (c); *Targus v. Puget* (d); *Kentish v. Newman* (e); *Lang v. Pugh* (f); *Home v. Pillans* (g); *Mayer v. Townsend* (h); *Lassence v. Tierney* (i); *Whitell v. Dudin* (k).

Mr. R. Palmer, in reply.

The MASTER of the ROLLS reserved judgment.

Nov. 22. The MASTER of the ROLLS.

The question in this cause arises on the construction of the will of General Carpenter, which was made in March, 1834.

The words of the bequest are as follows:—The testator gives an annuity of 2,000*l.* per annum to his wife and he directs certain securities to be set apart for that purpose; "and on her decease, the sums provided and set apart

(a) 5 Burr. 2703; cited in *Morrall v. Sutton*, 1 Phill. 533.
 (b) 6 East. 486.
 (c) 13 Ves. 476.
 (d) 2 Ves. sen. 194.
 (e) 1 P. W. 234.

(f) 1 Y. & C. C. C. 718.
 (g) 2 M. & K. 15.
 (h) 3 Beav. 443.
 (i) 1 M. & G. 551; 2 H. Tw. 115.
 (k) 2 Jac. & W. 279.

apart for such payment to become the property of my son *George Carpenter*, now captain in his majesty's 41st regiment of foot, so far as he the said *George Carpenter*, my son, shall receive the interest on such sum during his life, and on his demise, the principal sum to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters the deceased *Jane Ricketts* and *Mary Paxton* and of my now surviving daughter *Eliza Middleton* (should she have any issue) in equal portions to each."

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Colonel *Carpenter*, the son of the testator mentioned in this bequest, died on the 5th of *November*, 1854, leaving a son, now Captain *Carpenter*. The testator died in *January*, 1855; and the widow, who survived him, has since died. The question is whether, on this bequest, the gift to the child or children of the son of the testator takes effect, or whether it is destroyed, by the taking effect of the contingent bequest to the children of the daughter of the testator. In other words, whether that contingent bequest is to take effect on the death of the son during the life of the mother, whatever might be the state of his family, or whether it is to be inferred from these words, taken together with the whole scope and purpose of the will, that the meaning of the testator was, that the ulterior gift should take effect only in the event of his son dying, without leaving a child, in the lifetime of his mother.

The first thing to be looked at is the effect of the passage as it stands alone, and then it will be proper to consider the rest of the will, and to see how this view, to be derived from the bequest alone, is affected by the

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general scope and purpose of the whole will take together. Looking at the words containing the bequest by themselves, the first thing seen is, a clear gift to the children of his son, in the first branch of the sentence, gift which was vested in them on the death of the father. In the second branch of the sentence, the testator proceeds to give the property over, if the son die before his mother. If the meaning of this be, that the gift over is to take effect whether the son leave children or not, merely because he predeceases his mother, appears to me to be in a great degree inconsistent with and repugnant to the gift to the children of the son. I am at a loss to conceive, upon what principle the testator could have meant this bounty towards his grandchildren to depend upon the circumstances whether their father survived his mother or not. A bequest to grandchildren if their father survived his mother, but nothing to them if he did not, seems absurd, inconsistent and repugnant to itself, unless explained and made rational by some peculiar extrinsic circumstances, none of which exist in this case. To impute such an intention to the testator seems to me to be what the Court will not do, unless the words and the authorities are too strong to be overcome.

The word "but," on which much stress was laid on behalf of the other grandchildren of the testator, does not appear to me to assist their argument. It seems to me that this word is rather put in opposition to the gift to the grandchildren, and as if the word "*but*" referred to the possibility of his son having no children, as if it had run thus,—“but if there should be none, and if the son should die before his mother,” then over. But whether this be so or not, at all events, it is, in my opinion, too slight a foundation to build any construction upon. Certainly if the Court should arrive at the conclusion

sion that the two clauses of this sentence are repugnant to each other, no principle exists which will prevent this Court from introducing such words as may make them consistent, provided it is not contradicted by the plain and obvious meaning of the testator, as derived from the rest of the will. It is needless to refer to instances of this, of which the books are full. It may be stated as a general rule, that whenever the context requires it, words may be supplied, changed and transposed. To determine when the context requires this insertion, change or transposition of words, is more difficult to define, and there is no doubt, that this power is to be exercised very cautiously, lest a meaning be given to the will different from that which the testator intended. But when it is required to give to the whole sentence one uniform and consistent meaning, which without it would be irrational or repugnant, it may properly and indeed must be exercised.

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In my opinion, the two clauses of this sentence, as they stand, are inconsistent and repugnant. The first branch gives an estate to the children, the second takes it away, and the introduction of the words "without leaving a child" after the word "dying," in the second branch of the sentence, would, in my opinion, make the two branches of the sentence uniform and consistent.

The case of *Spalding v. Spalding* (a), to which I am referred, is very near this case, and is, I think, a sufficient authority to support the construction I put on this bequest. In that case a man had three sons; he devised land to his wife *Alice* for her life, and after her decease to the eldest son and the heirs of his body, and he declared that if that son died leaving *Alice*, the lands should

(a) *Cro. Car.* 185.

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should go over to another son. If the will in that had rested there, it would have been impossible to two cases more clearly resembling each other. In case the words "without issue" were introduced by Court after the word "died," which made the w consistent, and they were considered necessary for purpose. It is said, that in that case, the rest of will was referred to, as assisting that construction, that this construction was rendered necessary, bec the testator devised other lands to the second son the heirs of his body, and other lands to the third and the heirs of his body, and proceeded to direct if all his sons should die without heirs of their bo the land should go to the children of a brother. I can be no doubt that these devises and subseq expressions do assist much in explaining the mea of the testator in the particular clause in question ; I do not find that it was upon that ground alone the Judges, in that case, proceeded. In fact, the cipal ground seems to me to be, the expression o testator's intention that the heirs of the body of the son should take, and it is to be observed, that in case, they could only take by descent through father, whereas, in the present case, if I am right, take vested interests direct from the testator.

I proceed, therefore, in the present case, to exa the rest of the will of the testator, to see what general scope and object of it is, and which may tl a light on this particular clause. When I do th find nothing to justify the construction contendec by the ulterior legatees. I observe a great and solic anxiety to provide for his grandchildren generally, see no trace of any desire to exclude the child o son, or to provide for them otherwise ; but I ob a desire that all his grandchildren should be prov

for, so far as this intention can be derived from the careful direction respecting legacies in favour of the children of all his other children. This is all that I perceive that can bear on this question, and this confirms my opinion, that the intention of the father was, not to leave his son's children destitute, in case they should have the misfortune of losing their father early in life.

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The result is, that I shall declare that, according to the true construction of the testator's will, the child or children of Colonel *Carpenter* who survived the testator took a vested interest in the capital of the fund set apart to answer his wife's annuity, subject to her life interest therein.

The costs of all parties must come out of the residue.

NOTE.—An appeal to the House of Lords has been prepared.

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23.

STAINTON v. THE CARRON COMPANY.

After a decree in *England* for the administration of an English testator's estate, a Scotch company, whose *situs* was in *Scotland*, but which had agents and houses of business in *England*, commenced proceedings against the representatives in *Scotland*, where the testator possessed real and personal estate, to recover a debt. An injunction was granted to restrain the proceedings in *Scotland*, but which, on appeal, was discharged by the House of Lords. After this, the company commenced another action in *Scotland*, and a motion was made to restrain it, on the ground of the company having come in and adopted the proceedings in *England*. The application was refused by the Master of the Rolls, and by the full Court of Appeal.

THE facts of this case, and the previous proceedings in relation to the question at issue between the parties, are fully set out in the cases of *Maclaren v. Stainton* (a), and *Stainton v. The Carron Company* (b), and for the present purpose, it will only be necessary to state one or two facts and the dates of the various proceedings.

The *Carron Company* is a Scotch company, incorporated in 1773, and have offices and business premises in several places in *England*. From 1808 to 1851, *Henry Stainton* was their *London* agent. He died in *December*, 1851, being then domiciled and resident in *England*, but possessed of considerable real and personal estate both in *Scotland* and *England*, and a shareholder of the company to the extent of 80,000*l*. After his decease, the company claimed against his executors, who were also the trustees of his will, a sum of upwards of 100,000*l*., which they alleged they had discovered to be due to them, in respect of money improperly retained by their testator.

In 1852, two of the executors instituted the suit of *Maclaren v. Stainton* against the testator's heir-at-law, who was also an executor and trustee of his will, to establish the will, and for the administration of the estate ;

(a) 16 *Beav.* 279.(b) 18 *Beav.* 146.

estate; and, in *May*, 1852, the ordinary decree was made, for taking the accounts and ascertaining and paying the testator's debts. The company, notwithstanding this decree, of which they had notice in *October*, 1852, commenced proceedings in *Scotland* against the executors who had proved the will there for the recovery of the alleged debt. On the 10th *November*, 1852, the Plaintiffs in the suit of *Maclaren v. Stainton*, to which the company were not parties, gave them, at their office in *London*, notice of motion for an injunction to restrain proceedings in the Scotch suit; and on the 15th *November*, 1852, the injunction was granted, the company not appearing. On the 5th of *December* following, the company moved to dissolve, and the motion being refused (a), they appealed to the House of Lords from both the orders of the 15th *November* and the 5th *December*, and on the 11th of *July*, 1855, the orders appealed from were reversed (b). Pending the appeal, however, the following various proceedings took place. On the 27th of *April*, 1853, the company carried into the Master's Office a claim in respect of their alleged debt, which they stated to be without prejudice to their appeal, and which they declined to prosecute pending the appeal. The Master disallowed the claim for want of prosecution. On the 18th *June*, 1853, the company presented a petition to have their claim noticed without prejudice, but declining to prosecute it pending the appeal as before; and, on the 27th of *June*, their petition was dismissed. On the 18th *July*, 1853, the Master made his report, that, in his opinion, a bill should be filed against the company to get in the testator's shares, and the balance due to him from the company, and on the 20th of *July*, 1853, the report was confirmed, and on the 21st *July* a bill was filed against the company by

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(a) 16 *Beav.* 279.(b) See *H. of L. Cases*.

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two of the residuary legatees of the testator, which was demurred to by the company, on the ground that it was not filed by the personal representatives of the testator and on the 17th of *January*, 1854, the demurrer was allowed (a). An order was afterwards made in the administration suit of *Maclaren v. Stainton*, allowing a second bill to be filed against the company. On the 18th of *February*, 1854, the present suit of *Stainton v. The Carron Company* was duly instituted by the representatives of the testator, and on the 22nd *July*, 1854, the company put in their answer.

It was on the 11th of *July*, 1855, that the House of Lords gave judgment on the appeal reversing the orders complained of, and after this, the following proceeding took place. The Plaintiffs had amended their bill without requiring a further answer, but the company put in a voluntary answer on the 2nd of *August*, 1855. On the 17th *July*, 1855, the company commenced a fresh action in *Scotland*, and the Plaintiffs in *Stainton v. The Carron Company* now moved for an injunction to restrain them, the motion not being simply, as in *Maclaren v. Stainton*, for an injunction to restrain them absolutely; but, in the alternative, either to restrain them absolutely, or to restrain them from taking proceedings other than such as might be necessary for the purpose of obtaining such security or priority as they might be entitled to according to the law of *Scotland*.

Mr. *R. Palmer* and Mr. *Kenyon*, for the Plaintiffs, in support of the motion. On the appeal to the House of Lords against the former injunction, it was thought, upon the evidence before their Lordships, that the *Carron Company* had no *situs* in this country, and did not

(a) 18 *Beav.* 146.

not reside here, and that, in fact, they had not offices and places of business of their own, but merely agents to sell their manufactured iron and remit them the proceeds. Their Lordships were of opinion that the value of their machinery and the extent of their property here raised no inference that the persons transacting their business in *England* were anything more than mere agents, and that it could not, on the evidence, be held that this corporation had any existence whatever in *England*. It is submitted, however, that the company is now shewn to be within the jurisdiction of the Court on grounds beyond those stated in the House of Lords, and that the case can now be carried much further. It is clear that the *Carron* Company are not, as was assumed by the House of Lords or inferred from the evidence then before them, merely a Scotch company, but a company having established places of business in *England*. By the 2nd section of the Joint Stock Companies Registration Act (7 & 8 Vict. c. 110), the Act is made to apply to every joint stock company, as thereafter defined, established in any part of the *United Kingdom* except *Scotland*, or established in *Scotland* and having an office or place of business in any other part of the *United Kingdom* for any commercial purpose, &c. And by the 58th section a return is required to be made, to the registration office, of the name, purpose and place of business of the company. Now, in pursuance of these enactments, the *Carron* Company have made a return, in which they stated their name to be "The *Carron* Company," their business, "Smelting Iron," and their places of business, "*Carron* Works, *Carron*, *Stirlingshire*, Upper *Thames* Street, *London*, and *Liverpool*." [The Master of the Rolls,—That was compulsory.] Yes, but the question is, whether those are their offices or places of business, or those of their agents; and it being plain that they belong to the company,

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pany, they are within the jurisdiction. The case, however, involves two questions, first, the jurisdiction, and secondly, the propriety of exercising it. According to the other side, the case in the House of Lords was decided on the latter point, namely, the question of expediency, and that therefore the jurisdiction was admitted, and the whole question was as to the propriety of exercising it. If this case were the same as that before the House of Lords, it would be useless to discuss it, but it is very different. The injunction is not asked to restrain the action which was restrained by the former injunction. That action has ceased and a new action has been brought for the same purpose; but after full notice of the decree for administration in *Maclaren v. Stainton*. Besides, this injunction is sought, not in *Maclaren v. Stainton*, to which the company are not parties, but in *Stainton v. The Carron Company*, in which they are Defendants, and in which the issue is directly raised, whether such a debt as is claimed by them exists. But even in the first suit of *Maclaren v. Stainton*, they came in before the Master and asked relief—relief which no doubt may be said to be *sub modo*; but still they asked relief, on the ground that the testator *Henry Stainton* was indebted to the company. They have put in their answer in the second suit of *Stainton v. The Carron Company*, and have therefore submitted to the jurisdiction in both cases. Again, the contract was to be performed in *England* and related to an English agency, and even if made in *Scotland*, it was nevertheless an English contract, because it was to be performed in *England* (a). They cited *Beauchamp v. The Marquis of Huntley* (b); *Graham v. Maxwell* (c); *Bunbury v. Bunbury* (d). The documents relating

(a) 3 *Burge's Col. & For. Law*, 599.

(b) *Jac.* 546.

(c) 1 *Macn. & G.* 71; 2 *H. & Tr.* 427.

(d) 1 *Beav.* 318.

relating to the agency are in *London*, and this renders the English Court the most convenient *forum* for deciding the questions between the parties.

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Mr. Roupell and Mr. Lewin for all the parties beneficially interested in the testator's estate, in support of the motion, were not allowed to be heard, as they had not given notice of motion.

Mr. Rolt and Mr. Cotton, for the company, relied upon the decision in the House of Lords in the former case as conclusive in the present, inasmuch as assuming the jurisdiction, it was held to be improper to interfere.

They argued, that the disputes between the parties, involving questions of Scotch law, could be more conveniently determined in *Scotland*, and that the company were not to be deprived of the advantages which they possessed, under the Scotch law, in regard to their claim for interest, and to the non-application of the English Statute of Limitations.

Mr. R. Palmer, in reply, referred to *Hope v. Hope* (a) and *Bushby v. Munday* (b), to shew that the appearance of a party in a suit sets at rest the question of jurisdiction.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

In this case a motion was made to restrain the Defendants, the Carron Company, from prosecuting an action

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(a) 19 Beav. 237 and 4 De G., M. & G. 328. (b) 5 Mad. 297.

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action in *Scotland* against the Plaintiffs, which was brought in *July* last. The motion is made in a case of *Stainton v. Carron Company*, which suit was instituted in this Court in *February*, 1854. It is instituted for the determination of the same question as that which is to be determined in the action in *Scotland*. In the suit in this Court, the *Carron Company* have submitted to the jurisdiction of this Court; they have appeared, they have put in their answer, they have taken various proceedings in it, and they have raised no question respecting their being out of the power or out of the jurisdiction of this Court.

In this state of things, the Defendants have instituted a proceeding in *Scotland* to try the same question. In such a case, according to my view of the principles and doctrines of this Court, it would, if there were nothing more in the case, be a matter of course to restrain their proceeding in the foreign Court, if the Court came to the conclusion, that the question at issue could be more conveniently tried here than in the foreign Court, and if, at the same time, there existed a reasonable security, that, by restraining the proceeding in the foreign Court, the Defendants would not be deprived of their right. That such a security exists in the present suit cannot, I think, be doubted, for a decree exists in the cause of *Maclaren v. Stainton* for the administration of the estate of *Henry Stainton*, by which the Defendants could have the same question determined, and the existence of that decree, besides the power of giving them a right to institute proceedings under it actively, is also a reasonable security against the dismissal of the bill of *Stainton v. The Carron Company* by the Plaintiffs, which would deprive the Plaintiffs of the means of fully administering the testator's

tator's estate in the cause of *Maclaren v. Stainton*, in which the decree has been made.

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The Defendants cannot, in my opinion, now contest the jurisdiction of this Court, in this cause of *Stainton v. The Carron Company*, because they have submitted to it; and I repeat, that if this were all that there was in the case, I should have no hesitation in granting the injunction that is sought for.

But this case comes before me now in very different and under very peculiar circumstances. In the cause of *Maclaren v. Stainton*, I had, after the decree for the administration of the testator's estate, granted an injunction restraining the Carron Company from proceeding with an action in *Scotland*, exactly analogous to that which they have now instituted.

This order was pronounced by me in *November*, 1852, and, in *December* of that year, I refused an application to dissolve it. The House of Lords, in *July* of the present year, upwards of two years and a half after my order was pronounced, discharged that order, and declared that the action was proper, and that the Carron Company ought not to have been restrained, but ought to have had the liberty to continue the action. It is my duty, as far as possible, to place the Defendants in the same situation in which they would have stood, if the order which the House of Lords have disapproved of had never been pronounced. It is not possible to do this precisely, but of this I feel satisfied, that nothing turns on the fact that a new action has been instituted, and that I must treat the action now commenced exactly as if it were the old action subsisting, the former one having ceased solely by reason of my order. I feel also, that there would be an impropriety, on my part,

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part, in doing any act which might have the appearance of an attempt to evade the consequence of the decision of the House of Lords. If I granted the injunction on the facts now appearing, namely, that the Defendants had, in the cause of *Stanton v. The Carron Company*, submitted to the jurisdiction of this Court, after another two years that order might be discharged by the House of Lords, on the ground that, in obedience to the opinion expressed by the House of Lords, the injunction ought not to have been granted, while, in the mean time, a decree might be applied for, and, if granted, might be discharged again after two years appeal, when the case might have been fully concluded in this Court, and the adverse interests decided on the merits, although the House of Lords, all through the cause, thought it a question which ought more properly to have been tried in *Scotland* and not in this Court, and although, therefore, if this had been a fresh matter, I should, as I have stated, have felt no hesitation in granting the injunction, and although, in my opinion, the question between the parties can be more properly tried here than in *Scotland*, and although I foresee much expense and inconvenience that will arise from this double litigation, still I think, that I am bound to treat the present existing action as substantially that which the House of Lords has decided ought to continue, and that I am bound, as far as possible, to reinstate the Defendants in the position in which they would have been if the injunction had never been granted.

I shall therefore refuse this motion, but I shall do so without costs, making the costs of it costs in the cause.

I have not thought it desirable, although I have read it and carefully considered the matter, to follow the Counsel through the minute criticism and dissection of the

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In re THE MANCHESTER, SHEFFIELD, &c. -
RAILWAY COMPANY, *Ex parte* THE COR-
PORATION OF SHEFFIELD.

Nov. 24.

A leasehold interest is an "incumbrance" within the 69th section of the Lands Clauses Consolidation Act.

Under the 80th section of the Lands Clauses Consolidation Act, the promoters are not liable to pay the costs incurred by the application of their purchase-money in paying off an incumbrance on other parts of the estate of the owner.

Moneys paid into Court by two Companies, under the Lands Clauses Consolidation Act, ordered to be paid out on one petition, and the costs mentioned therefrom the same.

A PART of the real estate of the Corporation of *Sheffield* had been taken by the above Railway Company, and other part by a Waterworks Company, for the purposes of their respective undertakings, and the purchase moneys had been paid into Court.

Part of the other lands of the Corporation of *Sheffield* was subject to two long leases of ninety-nine years, granted by the corporation in 1798. It was proposed to buy up these leasehold interests, which were beneficial ones, by means of the moneys in Court, and a petition was presented for that purpose.

The Lands Clauses Consolidation Act (8 & 9 *Vict.* c. 18, s. 69) authorizes the application of the money to the discharge of any "incumbrance" affecting other lands settled to the same uses as the land taken, or in the purchase of other lands; and the 80th section regulates the costs payable by the promoters of the undertaking.

Mr. *Bristowe* in support of the petition. Though, under the Lands Clauses Consolidation Act, the money cannot be invested in leaseholds, *Ex parte Macaulay* (a), yet it may be applied in obtaining a surrender of a lease, which is an incumbrance within the act. He referred to *Re Cheshunt College* (b), and to *Re Cann* (c), as decisions

on

(a) 23 *Law J.*, Ch. 815.(c) 15 *Jur.* 3.(b) 1 *Jur.*, N. S., 995.

on the act as to copyholds. Secondly, he argued that the companies ought to pay all the costs of the proceeding.

Mr. C. C. Barber and Mr. G. W. Collins, for the two companies respectively, relied on *Ex parte* the Earl of *Hardwicke* (a), as deciding that upon the purchase of land by a railway company, the company are not liable to pay the costs caused by the application of the purchase-money in paying off an incumbrance upon the land.

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In re The
MANCHESTER,
SHEFFIELD,
&c. Railway
Company,
Ex parte The
Corporation of
SHEFFIELD.

The MASTER of the ROLLS.

I think that this is an incumbrance affecting the land within the act.

The act specifies certain costs which are to be allowed, and the Vice-Chancellor of *England*, in *Ex parte* the Earl of *Hardwicke*, thought himself bound to follow the act. I cannot distinguish these two cases, and I am also bound to follow it. It is not necessary to send the matter to the conveyancing Counsel, because the title is that of the corporation itself. The costs merely of obtaining the fund out of Court must be paid by the companies, and they must be apportioned between them in proportion to their purchase-moneys.

(a) 17 *Law J.*, Ch. 422.

NOTE.—See *In re Yeates*, 12 *Jur.* 279.

1855.

Re STANTON IRON COMPANY,
and

Nov. 24 and
26.

Re WINDING-UP ACTS.

Two traders, becoming embarrassed, assigned their joint and separate estate to trustees, to carry on the business for the benefit of their creditors, parties to the deed, and to pay the surplus to the traders. The trustees accordingly carried on the business, under the name of a company, until it became embarrassed.

Held, that such a company was not within the provisions of the Winding-up Acts.

Persons may be partners towards the world without being partners between themselves; but if they be partners between themselves, they are undoubtedly partners in respect of the public.

BY an indenture, dated 13th *November*, 1849, and made between *Benjamin Smith* and *Josiah Tunnicliffe Smith*, trading under the name of "*Benjamin Smith and Son*," and partners in the *Stanton Iron Works*, of the first part; *Francis Sanders*, *John Thompson*, *James Haywood*, the petitioner *David Wheatcroft*, and *Samuel Walker Cox*, of the second part; and the said *John Thompson*, *James Haywood*, *David Wheatcroft*, and the several other persons, &c. whose names were set forth in the schedule thereunder written, and whose names were thereunto subscribed, (being the joint and separate creditors of the *Smiths*), of the third part, the *Smiths*, for the purpose of satisfying their creditors as far as they could, assigned to the parties thereto of the second part, thereafter called the trustees, all the lands, iron stone, coal, charcoal or fire clay, and hereditaments comprised in a lease to them for twenty-one years from the 27th *April*, 1846, and all other the lands, tenements, terms of years, hereditaments and premises of or to which they or either of them were possessed or entitled, and all machinery in trade, goods, household furniture, and all other the estates and effects whatsoever and wheresoever of them, upon the trusts thereafter expressed. These were very numerous, and in some respects, peculiar. Among other things, the trustees were to pay the separate creditors of each one of his separate property, and apply the surplus thereof as joint property. The trustees were then directed to

sell

sell such parts of the joint property as should not be necessary to carry on the business, and dispose of the money to arise from the sale as part of the gross income of the business; to continue and carry on the business under the name and style of "The *Stanton* Iron Company," and to use and employ the works and the joint property for that purpose; to procure new or renewed leases of any parts of the business property held under lease; to insure any parts of the business property; to erect such buildings, works, machinery, &c. as they might think necessary for the business; to sell iron then or thereafter to be manufactured; to employ such managers, agents, &c., at such salaries, &c. as they might think fit; to pay, out of the gross income of the business, the rents reserved on the leases, the interest due on the mortgages and incumbrances, and all costs and expenses relating to the business, and to pay the net residue among all the creditors of the *Smiths*, parties thereto, in rateable proportions, according to the amount of their respective debts.

And the trustees were empowered, and at the request of two or more creditors to the amount of 3,000*l.* required, to call meetings of the joint creditors, the majority, in value, of whom present at such meetings might make, alter, add to, or diminish from the trusts and powers therein contained, and make rules, orders or directions as to the continuance or future management of the business; and if the discontinuance of the business should be directed, it should be discontinued in accordance with such direction, and the trustees should wind up the affairs, and apply the proceeds thereof in payment of the debts, contracts, engagements and liabilities of the business incurred by the trustees, and of the costs of the management of the business, and pay the clear residue to the creditors rateably. And after

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after payment of the debts of all the creditors to the benefit of the deed, the trustees were to have such parts of the trust estates, &c. as should be posed of in trust for the *Smiths*. The trustees were to keep proper books of account relating to the business, which were to be open to the creditors for inspection and examination. The trustees were also empowered to compromise, refer to arbitration, and pay debts not exceeding 100*l.*, and to pay a creditor in full whose debt was less than 10*l.* There was also a special clause of indemnity to the trustees in respect of the conduct of the business, and a covenant by the creditors, parties thereto, to accept the payment thereby made in full satisfaction of their claims; there was a power to appoint new trustees.

The deed was executed by the *Smiths*, the thirteen fourteen separate creditors of the *Smiths*, and one hundred and seven joint creditors, whose debts amounted to upwards of 57,000*l.*

Previous to the date of the deed, the property of the *Smiths* was subject to four mortgages of large amount, one of which was due to *James Hayward* the trustee.

The *Stanton* Iron Company was carried on, under the provisions of the deed, from the date thereof (1846 June, 1855, when the works were taken possession of by *John Bell Crompton*, one of the mortgagees.

The petition alleged, that the petitioner *David Walker Croft* and *Samuel Walker Cox* never took an active part in the management of the business, which was managed by the other three trustees, and not at all successful; that two of the three even becoming considerably indebted to the company. That during their management,

were various actions and suits by the incumbrancers to recover their respective debts, and ultimately the whole concern was taken possession of by Mr. *Crompton*, when, as the petition alleged, the company was virtually dissolved, and the business carried on for the purpose only of winding up the affairs; and various actions having been brought against the petitioner, by creditors, to recover their debts, he presented the present petition to obtain an order for winding up the company under the provisions of the Winding-up Acts.

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Mr. *R. Palmer* and Mr. *Cairns*, in support of the petition. The Winding-up Amendment Act (12 & 13 Vict. c. 108) extends the provisions of the Winding-up Act (11 & 12 Vict. c. 45) to all partnerships, associations and companies, consisting of not less than seven persons, except railway companies. Here the trustees are only five in number, and therefore if they alone are to be considered partners in the business, the company, in this case, is not within the act. But the substance of the deed is, that these trustees are to be directors of the company, and the creditors the shareholders, and an appropriation of the profits, by way of dividend, is provided for. The relation of debtor and creditor was destroyed on the execution of the deed, and it is therefore a company within the Winding-up Acts. There is a great distinction between common composition deeds and the present one; the business had previously been carried on under the firm of "*Benjamin Smith and Sons*;" but upon the execution of the deed, and by its provisions, that designation was changed and the concern took a new name, viz. "*The Stanton Iron Works Company*," and it was held out to the world as a totally new concern. Then the partnership so constituted contemplated the procuring of new or renewed leases, the erection of buildings, machinery, &c., the sale of iron thereafter to be

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be manufactured ; and the trustees were, by the provisions of the deed, empowered to carry on the business and do all acts necessary for that purpose, as fully as if they had been solely interested therein ; and the question of partnership is only one of principal and agent. There is also, in the deed, a provision for winding up the concern, after a general meeting of the creditors duly convened, and a direction given by them for it being wound up. There is also a power for the majority at a general meeting, to alter, add to or diminish the powers and trusts for the general benefit of the creditors and until such alteration should be made, the business was to be carried on according to the provisions of the deed. [*The MASTER of the ROLLS.*—But when the debts were paid it would stop.] Yes ; the *Smiths* might then step in and say, “ the objects of the deed have been accomplished, the profits have paid off all the creditors and we require a transfer of the residue of the trust property.” The maximum amount of profits that can be realized under the trusts is no doubt defined, and so far the partnership may be said to be limited ; but this is not material, for it is admitted, that if there should be no profits, the debts would not be paid, and therefore there could be no surplus to transfer. The question is whether this is within the Winding-up Acts ? that again depends on the question, is it a partnership ? and it is clear it is ; for the parties are interested rateably in the assets and are subject to the liabilities, until they have been paid 20s. in the pound. The sum realized or applicable to such payment is a profit, and the parties are interested in it and that is a partnership. One of the parties has sustained an injury by being sued, and is liable still to be further sued ; he comes to this Court for contribution under the provisions of the Winding-up Acts, and it is submitted he is entitled to relief. They cited *Owen v*

Bod

Body (a); *Janes v Whitbread* (b); *Coates v. Williams* (c); *In re The German Mining Company (Stone's case)* (d).

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Mr. Selwyn and Mr. C. Hall, *contra*, were not heard.

The MASTER of the ROLLS.

I think, at present, that this case is not within the operation of the Winding-up Acts, and I consider it a speculative attempt to obtain contribution through the provisions of those acts. I will read the deed before hearing the other side.

The MASTER of the ROLLS.

Nov. 26.

I am of opinion, that I cannot make the order which is asked, and that this is not a case within the statute at all. The question really is, whether the deed of the 13th of November, 1849, constituted a partnership between the parties thereto, so as to bring it within the provisions of the Winding-up Acts. I have two things to consider,—the relation in which the parties to the deed stand to each other, and their relation to third parties. There can be no doubt, that persons may be partners towards the world, and yet not be partners as between themselves. This is a very common case, and everybody is familiar with *Waugh v. Carver* (e), a leading case on this subject. But on the other hand, persons who are partners between themselves, are necessarily partners as re-

spects

(a) 5 *Ad. & Ell.* 28.

(b) 11 *C. B. Rep.* 406.

(c) 7 *Eich. Rep.* 205.

(d) 3 *De G. & Sm.* 120, 220.

(e) 2 *H. Bl.* 235.

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spects the public. Now it appears that this deed do not constitute a partnership between the parties who have executed this deed, but it is a deed for the benefit of the Messrs. *Smiths*, rather than for that of the creditors. The surplus profits and the residue of the true estate are treated as the property of the Messrs. *Smiths* the persons executing the deed of the third part are not held out to the world as partners, or as having anything to do with the business or the partnership, and I see no ground for supposing, that they could, under any circumstances, be held personally liable to the creditors in respect to the management of the business. What you have to consider in a case of partnership is, what is the proportion of capital and labour which is introduced or contributed by each of the partners, and what is the proportion in which the profits or dividends are to be divided amongst them?

I will assume that the argument of the Petitioner is right, namely, that the proportion of stock or capital contributed is represented by the amount of the debt of each party; but I will suppose (which I think is a proper way of testing it), that this was a business newly established, and, instead of debts forming the capital or stock, that the creditors, who were parties of the third part, had advanced the respective sums of money which now stand opposite their respective names in this deed, that is, about 50,000*l*. Suppose they advanced these sums of money to certain other persons, five in number, to establish and carry on a business on this condition:—that out of the profits they shall be repaid the sums which they have advanced simply, and that then, the business and the whole surplus profits shall be transferred and belong to certain third parties. Could it be said, that this was anything more

than a mere loan for the purpose of establishing a partnership? If I were to hold that persons were partners under such circumstances, it would hardly be possible for anyone to advance money to a partnership, to be repaid out of the profits, without making themselves partners; but such a case is not a partnership, and possesses none of the properties of a partnership, of which, indeed, the ordinary test and criterion are wanting.

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Undoubtedly, there are a great many cases of considerable nicety and difficulty in the consideration of what constitutes a partner, such as those in which parties are to be paid an annuity. There, if their annuity varies, that is, rises and falls in proportion to the greater or less amount of the profits, they will then become partners, because, they not only get a share of the profits, but the share varies in proportion to the fluctuation of the profits. But in the present case, the difference in the rate of the profits realized from time to time affects these persons no more than this:—that it makes the period of repayment of their loan earlier or later; for though they are to be paid out of profits, they will not get anything beyond the exact amount they advanced, whatever may be the rate of profits, assuming the concern, of course, to produce profits. This is the ordinary test in a question of partnership, because the fact, that a loan is to be paid out of profits, does not make the lenders partners, unless you establish the fact, that they take a proportionate rate of the profits as such. I find it exceedingly difficult to look at this in any possible view in which they could be made partners. Certainly, the having a right to look at the books and the accounts, and to see how the works are carried on, or even to give advice, does not constitute a man a partner, because

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*Re*  
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because a person may make a loan to a partnership, and stipulate that this right shall form an express condition upon which he advances his money to the partnership. Whether it is only the principal, or both principal and interest, that is to be paid out of the profits, is immaterial, it does not make him a partner: it may be, that the profits may not be sufficient to pay him for ten years, and the fact of their being greater or less does not make him any the more a partner.

The result is, that, in my opinion, it would be wholly impossible for me to hold (which I cannot find has ever been held in any case hitherto decided), that the creditors who have executed this deed of the third part are constituted partners, and liable to contribute to the losses of the concern, which have been incurred by those persons who have been carrying on the business.

The only case to which I was referred, in which it was pretended that any principle of this sort was established, was the case of *Owen v. Body (a)*, where, undoubtedly, there was a trust for carrying on business very similar to the present. There two persons, who had not executed the deed, issued execution against the property assigned, on the ground that the deed was a nullity. The question was, whether it was a good assignment? and the Court held that it was not. Lord *Denman* says, "on consideration we think, that upon the second ground of objection, this assignment was not good. The deed imposed such terms as might have constituted a partnership among the persons executing it, and those were terms to which creditors were not bound to submit. The assignment, therefore, was invalid."

(a) 5 *Ad. & Ell.* 28.

valid." Now it is to be observed, that all that was decided in that case was, that the assignment was invalid, and if that case applied to the present, it would decide nothing more than that this deed is invalid; but it certainly does not decide that any valid or legal partnership was constituted by reason of that deed being executed. I am of opinion, that the subsequent cases, to which I was referred, shew, that the opinion would be, that these persons would not thereby be constituted partners, and that a subsequent creditor of the concern could not have sued any one of those persons who were parties to the deed of the third part, and could not have made them liable for any contract entered into by the five persons who carried on the business.

I am of opinion, therefore, after considering the nature of this deed, and the provisions of the Winding-up Acts, that this is not a partnership within the meaning of those statutes, and that this is not a case in which I can make a winding-up order, for the purpose of enforcing contribution between these parties.

It is obvious to me, that the real ground for this application was this, that the parties have taken a name as if they belonged to a company, calling themselves, "The Stanton Iron Company," as though they were a joint-stock company; but that is the only resemblance which the case bears to a partnership, and on which it is sought to involve the persons who executed the deed of the third part, and bring them within the Winding-up Acts. No doubt, the five persons who carried on the business are liable to the public; but, as regards the other parties, they are merely *cestuis que* *trust* under a deed, the limited purpose of which was to pay, not a proportion of profits, but a certain fixed sum  
of

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of money out of the partnership property, and then to pay the remainder over to the *Smiths*, to whom the business originally belonged. The petition must be dismissed with costs.

Nov. 6 and  
Dec. 4.

*In re* MORSE'S SETTLEMENT.

A trust fund was limited, after the death of husband and wife, and, in default of appointment, to their children equally, to be a vested interest in, and to be paid, transferred or assigned to, sons at twenty-five, and to daughters at twenty-five or marriage, with benefit of survivorship in case of death under twenty-five, and, as to daughters, in case of being unmarried. Held, that the limitation was void for remoteness.

But leave was given to produce evidence that the intention of the parties was not carried out, and to have the settlement rectified.

ON the marriage of Mr. and Mrs. *E. M. Morse* in February, 1815, Mrs. *Morse's* fortune, consisting of a sum of money bequeathed to her by her father's will, and in part payable on her mother's death, and a sum of stock belonging to Mr. *Morse*, were vested in trustees, upon trust, as to both funds, for the husband and wife successively for life, and after the death of the survivor, as to the wife's fund, upon trust for all or any of the children of the marriage, as the husband and wife by deed, or the survivor by deed or will, should appoint; and as to the husband's fund, upon trust for all or any of the children, as the husband should by deed or will appoint, and, in default of any such appointment, as to both funds, if there should be but one child at the death of the survivor, in trust for that child, "to be for the portion of such one child and to be an interest vested in such only child, being a son at his age of twenty-five years, and being a daughter at her age of twenty-five years or day of marriage" . . . . "and to be paid, transferred or assigned to him or her on or at the same age, day or time, if the same happen after the decease of the survivor, the said," &c., but if in the lifetime of the said, &c., then immediately after the decease of the survivor, and if there should be two or more such children, then both funds were "to be divided between or among them in equal shares or proportions, and the share or shares of such of them as shall be a son or sons

to

to be an interest vested or interests *vested* in him or them respectively at his or their age or respective ages of *twenty-five years*, and the share or shares of such of them as shall be a daughter or daughters to be an interest vested or interests vested in her or them respectively at her or their age of or respective ages of *twenty-five years*, or day or respective days of marriage," "and to be paid, transferred or assigned to him, her or them, respectively, on or at the same ages," &c., respectively. And after the decease of the survivor of husband and wife, and in case of there being more than one child, "and any of them, being a son or sons, shall die under the age of twenty-five years, or being a daughter or daughters, shall die under that age without being or having been married, then and in every such case, if no appointment shall be made to the contrary, as well the original as the accruing share of each and every such child, or so much thereof as shall not have been raised or applied for his or their preferment or advancement in the world, shall go, accrue and belong to the survivors or survivor of such children, and, so far as circumstances will admit, shall *vest* in and be paid to him, her or them" at the same time as the original shares. After the usual provisions for maintenance and advancement, it was declared, that if there should be no child of the marriage who should become entitled to the funds, then the husband's fund was, on the death of the survivor, to be transferred to his executors, and the wife's to such persons as she should appoint, and, in default of a appointment, to her next of kin, as if she had died intestate and unmarried.

At the death of Mrs. *Morse*, there were four children of the marriage, two sons, who attained twenty-five and one of whom had since died intestate, and two daughters, both of whom were married.

Mr.

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*In re*  
MORSE'S  
Settlement.

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*In re*  
**MORSE'S**  
Settlement.

Mr. and Mrs. *Morse* made no appointment under their joint power ; but Mr. *Morse*, since the death of Mrs. *Morse*, had, at different times, appointed parts of the trust funds, and the residue now unappointed was 775*l.* New £3 per Cent. The surviving trustee, being advised that the limitation in favour of the children of the marriage was void for remoteness, paid the residue into Court under the Trustee Relief Act. Mr. *Morse* now presented a petition praying, in the alternative, either that the principal of the fund should be transferred to him or that the dividends should be paid to him for life.

Mr. *Osborne*, in support of the petition. The limitation to the children is clearly void for remoteness, both as to sons and daughters, though the limitation to the latter is in the alternative on their attaining twenty-five or being married. [*The MASTER of the ROLLS.* The limitation is void for remoteness, but the question is, whether it is not a case for a rectification of the settlement. As to daughters, it was not altogether void, for it is to vest on their marriage, which might be within the proper limits.] That is so, but the gift is to a class, and, as in *Leake v. Robinson* (a), the limitation would be void as to all, if invalid as to any of the class. Here the sons would be included, and, therefore, as they could only take at twenty-five, the trust is void, and the father is entitled to the residue remaining unappointed.

Mr. *E. F. Smith*, *contrà*. It is forty years ago since the trust was created, and it would now be difficult to reform the settlement, except from the recitals contained in it. But it is submitted, that, according to the true construction

(a) 2 *Mer.* 364.

construction of the settlement, the shares vested in the children at their respective births, and "to be an interest vested," refers merely to the time of enjoyment, or of its becoming indefeasibly vested, so as not to be subject to be divested. *Howgrave v. Cartier*(a). There are two cases, also, in which "vested" was held to mean "vested indefeasibly," namely, *Berkeley v. Swinburne*(b); *Taylor v. Frobisher*(c). In the investment and accumulation clause, in this settlement, the words "absolutely vested" are used, which shews what was intended, and if nothing vested till twenty-five, the survivorship clause was unnecessary, and, therefore, "vested" throughout must mean "indefeasibly vested."

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Settlement.

Mr. *Osborne*, in reply. The cases cited have no bearing on the present question. In *Howgrave v. Cartier* the whole turned upon the use of the word "such," and, in *Taylor v. Frobisher*, the intention could not be carried into effect without giving the words the construction contended for. If the intention here was to vest the shares at the birth of the children, no doubt effect would be given to it; but there is no indication of any such intention and the language to the contrary is plain. If there were even an ambiguity, the court, which leans to vesting, might then so construe the settlement, but here there is none.

*The MASTER of the ROLLS* reserved judgment.

*The MASTER of the ROLLS.*

Dec. 4.

The question on this petition was the effect of the settlement, which was in these words. [*His Honor stated the limitation.*] There is a provision for the advancement

(a) 3 Ves. & B. 79; Coop. 66.

(b) 16 Sim. 275.

(c) 5 De G. & Sm. 191.

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 Settlement.

ment and maintenance of the children before their share were payable. The question is, whether the gifts to the children are too remote, and I am of opinion that they are. It was endeavoured to bring their case within the case of *Howgrave v. Cartier* (a), *Berkeley v. Swinburne* (b) and *Taylor v. Frobisher* (c), and to maintain, that, notwithstanding the expression here used, the vesting must be considered to have taken place at the death of the tenant for life, and that the words of the settlement, referring to vesting at twenty-five, must mean only "indefeasibly vested;" so, that, if any child attained that age and afterwards died, no gift over was intended to take effect. But, I think, that this case is distinct from and is not governed by the cases to which I have been referred.

In *Taylor v. Frobisher*, the testatrix had given 1000*l.* to trustees in trust for *Ann Tayler* for her life, and, after her decease, upon trust to pay 1,000*l.* unto and between all the children of *Ann Tayler*, or, if but one, then to such one, to be a vested interest or interests on their respectively attaining the age of thirty years; but then the will went on to say, that if the child died under thirty without issue, that child's share was to go to the survivors and be vested at the same time as their original shares. In that case the Vice-Chancellor Sir *James Parker* held, that the word vested merely meant "indefeasibly vested," and he did so for this reason:—that, unless he so held, it would be impossible to satisfy the intention of the testatrix, in case one of the children of *Ann Tayler* should die under thirty leaving issue, in which case it was clear, that the testatrix did not mean the share to go over, and yet the issue could only take through

(a) 3 *Ves. & B.* 79.(b) 16 *Sim.* 275.(c) 5 *De G. & Sm.* 191.

through the parent; he, therefore, held, that the gift over only was too remote and not the original gift.

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*In re*  
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Settlement.

In *Berkeley v. Swinburne* (a), also, expressions were to be found which shewed an intention that the gifts should vest immediately on the death of the tenant for life.

*Hougrave v. Cartier* (b), the Master of the Rolls held, that if the words were plain and unambiguous they must prevail, but that, if ambiguous, the Court would infer a rational construction. In the case of this settlement, I look in vain for any words creating an ambiguity on the subject. I think that the words must have their regular and legal import; in fact, I think, that it is only the consequences which arise which could have raised a serious case for argument, and that, if the words of the settlement had been "that the interests should be vested at twenty-one" instead at twenty-five, the question never would have arisen. I am, however, as I observed at the hearing of this petition, strongly impressed with the belief, that this a mere blunder in the settlement, and that it is not framed, in this respect, according to the intentions of the parties to it. This appears to me so strong on the face of the settlement, that slight additional testimony would, probably, be sufficient to induce me to believe, that the intention of the parties to it was to give the children a right to the property settled as purchasers, and not that they should be altogether excluded. I propose to give the children an opportunity to adopt this course, if they think it worth while, which possibly it may not be, as the property has principally been appointed by their father, the Petitioner, in their favour, which cannot now be recalled. I shall, therefore,

(a) 16 Sim. 275.

(b) 3 Ves. & B. 79.

1855.

*In re*  
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fore, make an order in accordance with the prayer of the petition, but desire that it shall not be drawn up until the first seal after Hilary Term, and give all liberty to apply in the meantime.

### HOPE v. LIDDELL. (No. 2.)

June 19.

*A.*, without authority, sold a trust estate to *B.* In a suit to recover the money from *A.*, *B.*, who was not a party, was examined as a witness. A suit was afterwards instituted against the representatives of *B.*, to recover the estate itself, and an order of course was obtained in it to use the depositions in the former suit, saving just exceptions. It was discharged as irregular.

**GRACE THOMPSON**, acting without authority, sold a trust estate to *George Liddell*. One *cestuis que trust* instituted a suit of *Rackham v. Liddell* to make her representatives liable for the purchase money, and in this suit, *George Liddell*, who was party to the suit, was examined as a witness. On the application of *George Liddell*, the *cestuis que trust* instituted the present suit (*B. v. Liddell*) against the representatives of *George Liddell* to recover the estate itself.

The Plaintiffs obtained, in this suit, an order of course whereby it was ordered, that the Plaintiffs be at liberty to read and make use of the depositions taken in a certain other suit of *Rackham v. Siddall*, saving all just exceptions.

This order was made upon a petition, stating that in the year 1848, a suit of *Rackham v. Siddall* was instituted in this honorable Court, in which suit certain depositions were taken, both on the part of the Plaintiffs and Defendants. That both this suit and the said suit of *Rackham v. Siddall* related to the estates devised by the will of *William Spencer*, late of the city of London deceased. That the petitioners were desirous to

in this suit, the depositions taken in the said suit of *Rackham v. Siddall*. The Plaintiffs in the present suit were not parties to the suit of *Rackham v. Siddall*.


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The Defendants moved to discharge the order.

Mr. *R. Palmer* and Mr. *Amphlett*, in support of the motion. There are two classes of cases in which the evidence taken in one suit may be used in another; first, where the two suits are between the same parties; secondly, where the parties are different, but there is a community of interest, as in tithe suits and in suits to establish a custom, in which case it is necessary to have the pleadings produced, to shew to what points the evidence was directed. But where the parties are different, and have no community of interest, such an order as the present was never heard of. If such an order would be discharged in the second case, *à fortiori*, would it in the third. The only ground for the application was this,—that the testator was examined as a witness in *Rackham v. Siddall*, and that his representatives are bound by his admissions. If that be so, the order is unnecessary, because every confession or admission of a party is evidence against him and those claiming under him, whether it be made in a cause or otherwise. The order is only necessary in order to dispense with the necessity of proving the bill and answer; here it directs that all the depositions may be used; and, therefore, copies of the whole of them must be taken, which will entail a very useless expense. It will be said, that the words “saving all just exceptions” makes it unnecessary to discharge the order, but it will be too late to take the objection at the hearing, when the Defendants have taken copies of all the proceedings, and the expense has already been incurred and thrown away. They cited 2 *Daniel's Pr. (a)*; *Highfield*



1855. *Highfield v. Peake* (a); *Williams v. Broadhead* (b);  
 *Humphreys v. Pensam* (c); *Goodenough v. Alway* (d)  
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 v.  
 LIDDELL. Mr. Burdon, contra.

*The MASTER of the ROLLS* discharged the order as to costs.

(a) *Moo. & M.* 109.  
 (b) 1 *Sim.* 151.

(c) 1 *Myl. & Cr.* 580.  
 (d) 2 *Sim. & S.* 481.

GOVER v. STILWELL.

Dec. 3, 4.

A sum of 10*l.* is usually allowed, without taxation, for the costs of a petition to obtain money out of Court standing to a separate account, and in which no one but the Petitioners are interested.

IN this case,

*The MASTER of the ROLLS* said, that an inflexible rule, adopted by him, on petitions for the transfer of funds to a Petitioner standing to his separate account and in which no other person was interested, was, not to order a taxation of the costs, but to allow 10*l.* to the solicitor for the costs, without taxation.

Mr. Pole for the Petitioners.

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## HOPE v. LIDDELL. (No. 1.)

LIDDELL v. NORTON.

Nov. 16, 17,  
21.

Dec. 5.

**D**R. William Spencer, the owner in fee of some lands at Hull and elsewhere, made his will in March, 1798, by which he devised them to William Thompson, his heirs and assigns, upon trust, out of the rents, to pay an annuity of 150*l.* to his wife, and to pay the surplus rents to his daughter Catherine, the wife of Benjamin

A trustee devised "all his real estates, whatsoever and wheresoever," charged with a legacy. Held, that the trust estates did not pass.

A will was inaccurately

recited in a conveyance. Held, nevertheless, that the purchaser had notice of the real contents of the will.

When a trustee has a power of sale over real estate, with power to give receipts, and it is declared that the purchaser shall not be liable for the misapplication of the purchase-money, the payment to the authorized agent of the trustee, even though he be tenant for life, is not a breach of trust or invalid.

Where A., (a stranger to the trust,) assuming to exercise a trust for sale, conveys the estate to a purchaser, if this Court afterwards compels the purchaser to restore the land to the *cestui que trust*, the purchaser will be entitled to all the assistance which this Court or the *cestui que trust* could give him, to recover from the self-constituted trustee the purchase-money still in his hands, or for which he might remain liable.

In 1799, a testator devised an estate in trust for his daughter and her husband successively for life, with remainder to their children, and he gave to the trustee a power of sale. The trustee died in 1806, and the trust descended on his heir A. Immediately afterwards, B., acting without authority as trustee, sold the estate to a purchaser with notice, and allowed the purchase-money to be received by the daughter's husband. The husband died in 1837, and in a suit instituted by one of the children, his estate was declared liable for the purchase-money in his hands. The daughter died in 1845, and, in a suit by her representatives, the estate of B. was held liable for the trust-money to the extent of the daughter's interest only, and relief was refused to the children, who were Defendants. Between 1826 and 1830 the children had executed deeds reciting the sale, &c. In 1851 some of them instituted a suit to recover the estate itself from the purchaser. Held, that they were entitled to no relief; and, in a cross suit by the purchaser, the children were decreed to make good his title.

## DATES.

1799. Dr. Spencer died.  
1806. William Thompson died.  
1807. Conveyance by Grace.  
1821. Jonas died.  
1826. } Deeds executed by  
1830. } children.  
1837. Benjamin Norton died.

1837. Greene v. Norton.  
1845. Catherine Norton died.  
1846. Ruckham v. Siddall.  
1848. Decrees.  
1850. Appeal.  
1851. Ejectment.  
1851. Hope v. Liddell.

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Benjamin Norton, for life, with remainder to *Benjamin Norton* for life, with remainder to the children of *Catherine Norton*, as tenants in common in tail, with an ultimate remainder to *Matthew Spencer* in fee.

The will contained a proviso, that in case *Benjamin Norton* and *Catherine Norton*, or the survivor, should be desirous that the whole or any part of the estates should be sold, then "that it should be lawful for *William Thompson*, his heirs and assigns, to sell and dispose of the same, by and with the consent and approbation of *Benjamin Norton* and *Catherine Norton*, or the survivor of them, and after payment of the money to arise by the sale," to sign and give receipts for the purchase-money, which were to be sufficient discharges for the purchasers, who were not afterwards to be answerable "for any loss, misapplication or non-application of the purchase-money or any part thereof," and should hold the estates discharged of the uses, &c., thereby declared. The testator then directed the purchase-moneys to be laid out, either in the purchase of other hereditaments or upon good and sufficient security at interest, in the name of his trustee; and the hereditaments were to be conveyed to *William Thompson* and his heirs, to the uses thereinbefore declared and then subsisting. And the testator directed that the principal money, after the decease of *Benjamin* and *Catherine Norton*, should be equally divided amongst all such child or children as *Catherine Norton* might leave at her decease, to be vested and paid at twenty-one, and in default to *Matthew Spencer*.

The testator died in 1799. *William Thompson* accepted the trusts of the will and entered into possession of the lands. He died in 1806, having made his will, dated the 17th *December*, 1805, which was as follows:

" I give


"I give and devise all my real estates, whatsoever and wheresoever, unto and to the use of my sister *Grace Thompson*, her heirs and assigns for ever, charged with 50*l.* to my friend *Watson*." *William Thompson* left *Jonas Thompson*, his brother and heir-at-law, and *Grace Thompson*, his sister and devisee, surviving him.

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In June, 1806, *Benjamin Norton* entered into a written contract for the sale of about seventy-four acres of the devised property, (which was the estate in question in this cause,) for 6,300*l.*, to *George Liddell*. *Liddell* agreed to pay 1,000 guineas of the purchase-money on demand, and secure the remainder by the joint bond of himself and two other persons, to be paid at the expiration of three years, unless the then present war should not then be ended; and if the war should then exist, then one-half only was to be paid at the expiration of three years, and the other half so soon as a definitive treaty of peace should be signed, with interest until paid.

A conveyance of the lands was executed, dated the 21st of October, 1807, which was made between *Grace Thompson* of the first part, *Benjamin Norton* and wife of the second part, Mr. *Liddell* of the third part, and a trustee of the fourth part. It recited the will of *Spencer*, the will of *Thompson* (but omitting the important words "charged with 50*l.* to my friend *Watson*"), by virtue of which *Spencer's* property had become vested in *Grace Thompson* upon the trusts of *Spencer's* will; that *Grace Thompson*, in pursuance of the power of sale in *Spencer's* will, and with the consent of *Norton* and wife, had, "some time ago," contracted with *Liddell* for the sale of the property for 6,300*l.* It then purported to convey the property in consideration of that sum, expressed to be paid to *Grace Thompson*. A receipt

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ceipt for the payment of the purchase-money, on the same day, was indorsed and signed by *Grace Thompson*—

It must be here observed, that if, as was held, the trust estate did not pass by the will of *William Thompson*, this conveyance did not pass the estate to *Liddell*, for *Jonas Thompson*, the heir-at-law of *William Thompson*, was still living, and lived until 1821.

The whole of the purchase-money of 6,300*l.* was received by *Benjamin Norton* at different times, and was by him misapplied, and he gave *Grace Thompson* a bond of indemnity against the consequences of her having allowed him to receive the money.

Benjamin Norton died in 1837, and *Catherine* his wife died in 1845. Their children were Mr. *William Spencer Norton*, *Edward Norton*, *Georgiana Seton*, *Mary Hope* (the Plaintiff) and *Catherine Greene* (deceased).

It is now necessary to advert to the different suits which had been instituted in this Court relative to these matters.

On the death of *Benjamin Norton*, a suit of *Greene v. Norton* was, in 1837, instituted by *Greene*, the husband and representative of *Catherine*, one of the children, who had died in 1825, to administer *Norton's* estate and to make it liable for the trust moneys received by him. By the decree (1848), the parties beneficially interested under *Spencer's* will were declared creditors of *Benjamin Norton* for 6,800*l.*, produced by the sale of the trust estates and received by him, without prejudice, however, to their right to resort to the estates of the *Thompsons* or to the estates sold.

In

In July, 1846, a suit of *Rackham v. Siddall* was instituted by the administrators of *Catherine Norton* against *Siddall* (the executrix of *Grace Thompson*) and others, and seeking to charge the estate of *Grace Thompson* with the purchase-money for the trust estates, which she had allowed *Mr. Norton* to receive. In her answer, filed in January, 1847, *Charlotte Siddall* denied that *Mr. Thompson* left *Grace Thompson* his heir-at-law. At the hearing of *Rackham v. Siddall*, the children of *Benjamin Norton* and wife supported the claim of the Plaintiff, and the Vice-Chancellor of *England*, on the 13th of July, 1848, held (a), that though the trust estates had not passed to *Grace Thompson* by her brother's will, yet, as she had assumed the character of a trustee, she incurred the responsibilities of one, and he declared (b), that *Grace Thompson* having permitted *Benjamin Norton* to receive the 6,300*l.*, that sum ought to be made good out of her assets. Upon appeal, in 1850, the decree was varied by Lord *Cottenham*, who was of opinion, that the relief ought be limited to the interest of the deceased tenant for life, and ought not to extend to the capital sum of 6,300*l.* (c). The Lord Chancellor, on that occasion, expressed an *extra* judicial opinion, that the children, except one, by their mode of dealing, had disentitled themselves to relief against the representatives of *Grace Thompson* (d). It will be necessary to refer to these acts hereafter.

In 1851, after *Catherine Norton's* death, the Plaintiffs and others had commenced an action of ejectment to recover the property, which had abated by the death of *George Liddell* in the same year; and the Plaintiffs, as they alleged, were unable to try their title at law, in consequence

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(a) 16 *Sim.* 297.2 *H. & Tw.* 54.(b) *Ib.* 306.(d) See 1 *Mac. & Gor.* 620,(c) See 1 *Mac. & G.* 620, and 2 *H. & Tw.* 54.

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consequence of an outstanding term of 500 years—  
 created in 1775, which, in 1838, *George Liddell* had  
 got surrendered to him, but which had not merged, he  
 not having any legal estate.

Another difficulty apprehended by the Plaintiffs was,  
 that if they relied on a demise by *Grace Thompson* or  
 of her heir, her conveyance in 1807 would operate as an  
 estoppel.

The present suit of *Hope v. Liddell* was instituted, in  
*November*, 1851, by Mrs. *Hope* and her mortgagee, and  
 by Mr. *Greene* (who represented the daughter *Catherine*)  
 and his mortgagee, against the representatives of *Liddell*,  
 against *Alder*, a purchaser of part of the estate from  
*Liddell*, and other necessary parties.

The bill prayed a declaration, that the Plaintiffs and  
 the Defendants, who were in the same interest, were  
 entitled to the possession of the property, for the assign-  
 ment of the terms, for an injunction to restrain their  
 being set up, for the assistance of the Court in trying  
 the right, and for the delivery over of the title deeds.

The Defendants insisted, that the children, knowing  
 the purchase-moneys to be in the hands of *Benjamin*  
*Norton*, their father, had recognized and adopted the  
 transaction, and had executed various deeds, &c., and  
 done various acts, shewing that, with full knowledge  
 of the receipt of the moneys by the father, they had  
 sanctioned and adopted the sale. The deeds so exe-  
 cuted were as follows :—

On the 1st *September*, 1826, *Edward Spencer Norton*  
 and the Plaintiff Mrs. *Hope* executed a deed, which  
 recited the will of Dr. *Spencer*, the birth of five children,  
 the

the sale of the property, and that the purchase-money had been invested, "in the name of the trustee under the said will," on mortgage of the *Bawburgh* estate belonging to *Benjamin Norton* (which last statement was at variance with the truth), and by this deed they charged with an annuity of 60*l.*, granted to *Eleanor Hunter* in consideration of 500*l.*, all their shares in all the money which arose from the sale of the devised estates "and then remaining in the hands of *Benjamin Norton*, upon the security of a mortgage of his aforesaid estate, or of and in all other the estates, funds and securities, in or upon which the same money" should thereafter be placed out or invested.

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On the 1st *April*, 1828, the Plaintiff *Mrs. Hope*, *Edward Spencer Norton*, and their sister *Georgiana* executed a similar deed, with similar recitals, to secure an annuity of 72*l.* to a person of the name of *Higham*.

On the 2nd *February*, 1829, a settlement was executed on the marriage of *William Spencer Norton* with *Miss Cooper*, by which, after reciting that he was entitled to a share in certain moneys which had arisen from the sale of certain lands situated in *Yorkshire* and *Hull*, he proceeded to settle these shares upon the trusts of that indenture.

On the 6th *March*, 1830, a deed of arrangement was entered into, between *Edward Spencer Norton* and his father. This deed recited the will of *Dr. Spencer*, the grants of the two annuities above mentioned, and by it, *Edward Spencer Norton* assigned and transferred to his father all the shares to which he then was or thereafter might become entitled to "in the money arising from the sale of the hereditaments and real estate devised" by *Dr. Spencer*.

On



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On the 20th *April*, 1830, Mr. and Mrs. *Seaman* (formerly Miss *Georgiana Spencer Norton*), executed a mortgage to Mr. *Currie* for 1,700*l.*, which recited the will, the sale of the property, the investment of part of the money arising therefrom in lands at *Bawburgh*, and that "the remainder thereof was now in money; and thereby her fifth of the lands devised, and of the moneys arising from the sale, and the securities on which the same "are or shall be" invested, and of the lands purchased was thereby conveyed to the mortgagee.

The Court considered, that the evidence in the present suit shewed, that, during the life of *Benjamin Norton*, the family were all aware that the whole of the property derived from Dr. *Spencer* had been sold, and that the purchase-money had been paid to *Benjamin Norton*:—that part of the proceeds had been invested in the purchase of the *Bawburgh* estate, and that part remained uninvested in the hands of their father.

After the institution of the suit of *Hope v. Liddell*, the *Liddells* filed a cross bill, for a declaration, that, under the circumstances, it was not competent for the children of *Catherine Norton* to dispute the validity of the sale by *Grace Thompson* to *George Liddell*; that they might, if necessary, execute a proper conveyance to the Plaintiffs, and be restrained from proceeding to eject them.

The two suits now came on for hearing.

Mr. *Lloyd* and Mr. *Burdon*, for the Plaintiffs in the first suit. First, the legal fee passed under the will of *Spencer* to his trustee *William Thompson*. It did not, however, pass to *Grace Thompson* by the general devise  
 in

in *William Thompson's* will; *Rackham v. Siddall* (a), but descended on his heir at law, *Jonas Thompson*; consequently, the sale and conveyance by *Grace Thompson* to *George Liddell* was nugatory, she having no estate or interest whatever in the property, and being a stranger to the trusts and powers contained in *Spencer's* will. The case is similar to *Hicks v. Sallitt* (b), there trustees of a will, under the belief (which turned out erroneous), that three allotments had passed by the will, sold them in 1814, the Plaintiff's title accrued in 1831, he attained twenty-one in 1849, and soon after filed a bill claiming the three allotments, the Court made a decree in his favour.

Secondly, *Grace Thompson* professed to act as a trustee, and took upon herself the duties and responsibilities of that office. Treating the matter on that basis, the sale and the transactions connected with it were a manifest breach of trust, of which the purchaser had full notice. As a trustee, she had no right to delegate her authority to *Benjamin Norton*, the tenant for life, and enable him to enter into a contract for the sale of the trust estate. In *Mortlock v. Buller* (c), Lord *Eldon* says "the most improvident course that can be adopted is, to entrust the tenant for life with the execution of such a power as this; for it is generally the interest of the tenant for life to convert the estate absolutely into money, either with a view to sell another estate to his family, or for the ordinary purpose of getting a better income during his life." The mode of payment of the purchase-money was itself a breach of trust; for, under a power to sell for money, the trustee sold the estate for a debt, postponing the payment to a future contingent period,


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(a) 16 Sim. 297; 1 Mac. & G. 617, and 2 H. & Tw. 44.

(b) 3 De G., M. & G. 782.

(c) 10 Ves. 308.

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period, namely, a general peace, when the funds would be much higher. In addition to this, the trustee allowed the purchase-money to be paid into the wrong hand, and she and the purchaser, with whose concurrence and assistance this was done, were, on that ground, guilty of a breach of trust; for a trustee is not justified in allowing the purchase-money for a trust estate to be received by any one but himself (a). Mr. *Liddell* is responsible, he having express notice of the trust, and participating in these irregular transactions. That he had direct notice is evident; he purchased expressly under the power in *Spencer's* will; the conveyance to him recites *Thompson's* will, inaccurately it is true, but it gave him notice of the contents, and it became his duty, as a purchaser, to investigate the title and see that the will was accurately set forth. The conveyance is expressed to be made for money paid at the time, and a receipt for it, signed by *Grace Thompson*, is indorsed; this *George Liddell* knew to be false, and although he might not, upon the terms of *Spencer's* will, have been bound to see to the application of the purchase-money, yet, "when the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice;" *Balfour v. Welland* (b). He paid his purchase-money into the wrong hand, and therefore never obtained a valid discharge for it. The bond of indemnity at once fixes him with full notice of the breach of trust, and the irregularities in the sale, for it recites the transaction.

It will be said by the Defendants, that they are purchasers for valuable consideration; secondly, that the  
 Plaintiffs

(a) 3 *Sugd. Vend.* (10th ed.) 157.

(b) 16 *Ves.* 151.

**Plaintiffs** are barred by lapse of time; and thirdly, that **the** Plaintiffs have adopted and acquiesced in the sale.

**The** plea of purchaser for valuable consideration **without** notice is out of the question, for notice is **clearly** brought home to *George Liddell*. To support **such** a defence, he must deny notice and answer all the **acts** shewing it, *Jerrard v. Saunders* (a), and must shew **that** the vendor was or pretended to be seised; for a purchaser from a perfect stranger can never set up such a defence; *Head v. Egerton* (b). Here, all parties had notice of the bad title of *Grace Thompson*, and that she **had** no right to act in the trust, and even if the purchase **had** been made under a false representation, it must be shewn, that the falsehood of the fact asserted could not have been detected by reasonable diligence; *Jones v. Powles* (c). As to the lapse of time, the Plaintiffs, who were entitled in remainder, were not bound to take any proceedings until the death of the last tenant for life in 1845. At law, a remainderman cannot bring ejectment until his estate comes into possession, and his remedy in equity is analogous; *The Duke of Leeds v. Lord Amherst* (d); *Earl Pomfret v. Lord Windsor* (e); *Phillipson v. Gatty* (f). The rule applicable to stock, as in *Browne v. Cross* (g), is inapplicable to real estate.

As to the children's adoption of and the acquiescence in the transaction, two things will be relied on, first the proceeding in the suit of *Rackham v. Siddall*, and secondly, the deeds executed by the children. But to constitute adoption and acquiescence, there must be a full knowledge of all the material circumstances; and it is clear, from the deeds themselves, that the children did

not

(a) 2 *Ves. jun.* 187.

(b) 3 *P. Wms.* 281.

(c) 3 *Myl. & K.* 581.

(d) 14 *Sim.* 357; 2 *Phill.* 117.


(e) 2 *Ves. sen.* 481.

(f) 7 *Hare*, 516.

(g) 14 *Beav.* 105.

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not possess an accurate knowledge of the facts. They were not aware that *Grace Norton* was not a trustee and they considered that the statement in the deed was accurate, that the trust moneys, though in the hands of *Benjamin Norton*, were secured by a mortgage on the *Bawburgh* estate. The present Plaintiffs were Defendants in *Rackham v. Siddall*, and are not bound by the extra judicial observation of Lord *Cottenham* in that suit (a) on matters not in issue therein, founded on statements in the Plaintiff's bill which did not even bind the Defendants; besides, Lord *Cottenham* never could have intended, that the parties were bound by the execution of the deeds mortgaging and dealing with the fund. *Catherine Norton* herself had executed several, nevertheless, her representatives obtained relief by a decree made by Lord *Cottenham* himself. The present Plaintiffs were held entitled to no benefit from that suit, and, therefore, they can never be said to be bound by or to have adopted it.

The deeds executed by the children could not confer any right on the present Defendants, who were not parties to them, or relieve them from any obligation; the deeds were *res inter alios actæ*; besides, they proceeded on an inaccurate knowledge of the facts, for they all assumed that the sale had been made by some person competent to execute the trusts, and that the money was properly secured by mortgage; both of which facts were untrue. Acquiescence cannot be put higher than a release, and if the present Plaintiffs had actually executed a release to the Defendants, it would be set aside upon its being proved to have proceeded on an inaccurate statement of the facts. If the Vice-Chancellor of *England's* decree had stood, directing repayment of the whole fund, and it had been paid accordingly

pr

(a) 2 H. & Tw. 54.

present Plaintiffs might then be precluded from going against the estate itself, but then their claims would have been satisfied. Here they, as yet, have received nothing, and when Lord *Cottenham* reversed the decree of the Vice-Chancellor of *England*, and held that the children were not entitled to relief against the representatives of *Grace Thompson*, they immediately became entitled to recover the estate, and they forthwith commenced their action of ejectment.

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The 8 & 9 *Vict.* c. 112, was also cited as to the outstanding terms.

Mr. *Toller*, for a mortgagee of *Catherine Greene's* share. The equity of this case is very plain. An estate is devised to parents for life with remainder to their children. On the death of the parents, the children demand the estate, which has been sold by a perfect stranger, and they find the purchaser in possession of their property without any title whatever. It would be a total denial of justice, if the Court were to refuse its assistance to the children, to obtain possession of the estate thus distinctly devised to them. It, in fact, remains unsold at the present moment, and this fact is material for those representing *Catherine Greene*, who predeceased her mother, inasmuch as the estate and the purchase-money are limited to the children in different ways. *Catherine Greene*, though interested in the estate, took no interest in the purchase-money, because she did not survive *Catherine Norton* her mother.

Mr. *Baggallay*, for Mr. *Spencer Norton*, a person of unsound mind.

Mr. *Rogers*, for *Cooper*, a party in the same interest.

Mr. *R. Palmer* and Mr. *Amphlett*; for the purchaser *Liddell*, and

1855. Mr. *Roupell* and Mr. *Giffard*, for *Alder*, purchase  
 of part of the estate from *Liddell*.

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This is a pure ejectment bill, which can only succeed on the strength of the Plaintiffs' title; but there are several reasons for holding them entitled to no relief. First, the trust estate passed to *Grace Thompson*, under *William Thompson's* will; *Elliott v. Elliott* (a); *Lore Braybroke v. Inskip* (b); *Bainbridge v. Lord Ashburton* (c). The estate passed under her conveyance, and the purchaser was not bound to see to the application of the purchase-money; the payment of which to the authorized agent of the vendor is the usual mode of proceeding, and is perfectly valid.

Secondly, assuming that the trust estate did not pass to *Grace Thompson*, still she acted as and was the *de facto* trustee, and here there was a power to sell which distinguishes the case from *Hicks v. Sallitt* (d), where the trustees had no authority to dispose of the property. The only flaw is, that the wrong person assumed to act, but that was rectified, by *Grace Thompson's* title subsequently accruing on the death of *Jonas*, as well as by the adoption of the sale by the parties interested. There was a binding contract entered into by the tenant for life, and all that the parties interested could receive was the purchase-money. In *Bowen v. Evans* (e), in a suit by a judgment creditor of a testator, a settled estate was sold, and great and numerous errors and irregularities had taken place in the sale and proceedings in the cause. After the death of the tenant for life, the remainderman instituted a suit to set aside the sale, but the Court refused to interfere, holding, that if it could do justice to the persons claiming under the settlement, and at the same

(a) 15 Sim. 321.

(b) 8 Ves. 431.

(c) 2 You. & Coll. (Exch.) 347.

(d) 3 De G., M. & G. 782.

(e) 1 Jones & Lat. 178, and 2

H. of L. Cas. 257.

same time support the sale, such was the measure of equity which ought to be administered.

Both Mr. *Liddell*, and they to whom he has sold, are purchasers for valuable consideration, and they had no notice of the Plaintiffs' alleged rights, for a purchaser is not bound by notice of any equities arising from the construction of doubtful words in an instrument; *Cordwell v. Mackrill* (a). The doctrine of constructive notice is not to be extended, and the question is not, whether there were the means of ascertaining the rights of other parties, but whether there was gross and culpable negligence on the part of the purchasers; *Ware v. Lord Egmont* (b). If the Defendants be purchasers for valuable consideration without notice, this Court will not interfere against them, *Attorney-General v. Wilkins* (c), or restraining them from availing themselves of the outstanding term. The length of time is not set up by the Defendants as a bar, but is relied on as shewing the difficulty, if not the impossibility, at this distance of time, of proving the circumstances necessary to shew the validity of the sale, which they might have done if the matter were recent; *Browne v. Cross* (d). The Plaintiffs had notice of the sale, and in 1847 they must have had notice that *Grace Thompson* was not a trustee, for this fact appeared on the answer of *Charlotte Siddall*, and they ought, at once, to have taken proceedings. Instead of doing this, they have adopted the sale and claimed the produce, which could only be done on the foundation of the sale having been valid. The decree in *Greene v. Norton* declared them to be creditors of their father's estate for 6,800*l.*; in *Rackham v. Siddall* they supported the Plaintiffs in the attempt to

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(a) 2 *Eden*, 344, and *Amb.* 515.(b) 4 *De G., M. & G.* 460.(c) 17 *Beav.* 285.(d) 14 *Beav.* 105.



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to charge the representatives of *Grace Norton*, when is evident that they could not be entitled both to the estate and to the produce of it. If *A.* be indebted *B.*, and *B.* has recovered the amount from *C.* in action for money received by *C.* from *A.* for *B.*'s use *B.* would not afterwards be allowed to sue *A.* for the same sum, on the ground of his having improperly made the payment to *C.* If the estate be recovered back, the purchaser would be entitled to his remedy against the vendor, but the proceedings of the Plaintiff have now prevented him.

Mr. *Lloyd*, in reply. This is a case of extreme hardship on the children. When their estate comes into possession, they are neither to get the estate nor the money. In the cases cited, where the sales have been supported, there was authority to sell; here there was none, the estate remaining in specie and subject to the trusts of the will. *Grace Thompson* being a complete stranger to the trust, her acts had no operation, and her sale cannot be confirmed until payment of the purchase-money to the proper objects. As to the Defendants being purchasers for valuable consideration, it is unavailing, for they had notice of the will which is recited in the conveyance, and if the abstract stated the limitations of *Spencer's* will inaccurately, it was the duty of the purchasers to compare the abstract with the original; *Mertins v. Jolliffe* (a); *Parker v. Brooke* (b); *Davies v. Davies* (c).

[*The MASTER of the ROLLS.*—I think you need not go into that, for if they had notice of the will, they had notice of its contents. I really do not doubt it.]

The

(a) *Amb.* 311.
 (b) 9 *Ves.* 586.

(c) 4 *Beav.* 54.

The decree in the former suit was made expressly "without prejudice" to the right of recourse to the estate itself, and cannot affect the Plaintiffs' rights.

The statute of 8 & 9 Vict. c. 112, was referred to in respect to the outstanding terms.

The MASTER of the ROLLS.—I will consider this case.

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This is a suit to recover two closes of land, consisting of seventy-three acres and a half, in the neighbourhood of Hull. They were conveyed to the purchaser in October, 1807, but the Plaintiffs' title did not accrue until July, 1845. The circumstances of the case are very peculiar, and must be shortly referred to, in order to make my judgment intelligible. [*His Honor here stated the will of Dr. Wm. Spencer.*]

It is material here to observe, that the ultimate trust of the land, if unsold, and of the new land to be purchased, was in favour of all the children of Catherine Norton; but the ultimate trust of the purchase-money was in favour only of such of her children as she "might leave at her decease." Under this will, it is, I think, plain, that the legal estate in the devised hereditaments was vested in Wm. Thompson the trustee. He made his will in December, 1805, and by it, he devised all his real estates, whatsoever and wheresoever, unto Grace Thompson and her heirs, "charged with a legacy of 50*l.* to his friend Watson." The second testator, Wm. Thompson, died in 1806, leaving Jonas Thompson, his brother and heir at law, and Grace Thompson, his sister and devisee, surviving him.

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The first question raised is, whether the legal estate in *Dr. Spencer's* hereditaments passed by this will, or whether it descended on his heir at law? This was not very strenuously contested, and, in my opinion, little doubt can be entertained, but that the will of *Wm. Thompson* did not dispose of this trust estate, and that the legal estate in *Dr. Spencer's* devised estates descended on *Jonas Thompson*, the heir at law of the trustee. This, however, does not appear to have been known to *Grace Thompson*, and Mr. and Mrs. *Norton* seem to have believed, that *Grace Thompson* was the heir at law of her brother *William*; at all events, all parties acted on the assumption that she, in the event which had occurred, became, on the death of *Wm. Thompson*, the trustee under *Dr. Spencer's* will.

In *June*, 1806, *Benjamin Norton* entered into a contract to sell the land in question to *George Liddell* for 6,300*l.*, upon very peculiar terms as to the payment of the purchase-money.

In *October*, 1807, *Grace Thompson* executed a proper conveyance of the hereditaments, and she signed a receipt for the purchase-money, although she received nothing, and although, in fact, the purchase-money had not then been paid, but only secured in the manner I have stated. The purchase-money and interest was, however, afterwards paid in full to *Benjamin Norton*, according to the contract and with the sanction of *Grace Thompson*, who received from *Benjamin Norton* a bond of indemnity, in consideration of her permitting him so to receive it. The conveyance recited the wills of both *Dr. Spencer* and *Wm. Thompson*, so that the purchaser had full notice of both, and of their contents.

The first question I have to consider, in the view I
take

take of this case, is, whether in these circumstances alone, if there were nothing more in the case, I should, if Mr. and Mrs. Norton had died shortly afterwards, and their children had instituted a suit for the recovery of the land, have given them any and what relief.

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This divides itself into two questions: 1st, that which relates to the character of the contract and the transaction itself; and 2ndly, that which arises out of the circumstance, that *Grace Thompson* had no legal estate to convey. These questions are perfectly distinct and should not be mixed up together; the first question must be considered exactly in the same way that it would be, if *Grace Thompson* had had vested in her the legal estate which she purported to convey, and in that view of the case the question is this:—is the nature of the contract such, coupled with the fact that the money was actually paid to one of the *cestuis que trust* and not to the trustee, that this Court would have treated it as fraudulent and void and set it aside? I am of opinion, upon the evidence before me, that it would not have done so. It is not alleged or suggested that the 6,300*l.* was not the full value of the land in question; there is nothing stated or proved to shew that the contract was not entered into perfectly *bonâ fide*, or that the purchaser gained any undue advantage by the nature or character of the sale. In this view of the case the decision of Lord *St. Leonards*, in *Bowen v. Evans* (a), is very material. In that case, a sale had been directed by the Court, it was conducted with great irregularity; there was no sale by auction, but a sale by arrangement between the parties, and the suit was, in truth, instituted to give effect to a contract for purchase entered into many years before; the conveyance was not executed

(a) 1 Jones & Lat. 178.

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cuted at the time, and, when it was executed, various interests had come into existence which were not represented. Lord *St. Leonards*, having found evidence establishing that the sale was made *bonâ fide* for full value, refused to disturb it, at the instance of a remainderman who was not bound by any of the proceedings. It is true, that in that case the sale had been made under the decree of the Court, but the sale was not according to the decree; and the decree of the Court would not have supported the sale had it been fraudulent. The decision rests on broader grounds, and the case of *Townsend v. Warren* (a), cited by the Lord Chancellor, and on which he relies, goes far beyond the present, on this part of the case.

I think that the payment of the purchase-money to *Benjamin Norton* affords no evidence of fraud. The purchaser was expressly exempted from the duty of seeing to the application of the purchase-money, he was bound to pay it in such manner as the trustee directed; and the purchaser having obeyed the direction of the trustee to pay it to another person, has, in my opinion, thereby made a payment of it to the trustee himself, and is exonerated from the consequences of misapplication, unless the purchaser had express notice that the person to whom he was directed to pay it was about to commit a breach of trust, in such a way as to make the purchaser, in fact, a party to the wrongful act. If, in this case, the trustee had said to the purchaser, "if you pay it to *Benjamin Norton* it will be the same as if you paid it to me, and I will give you a receipt for the purchase-money," I do not see in what way the purchaser could have justified any refusal to complete the purchase, on the ground that the person so specified was not duly authorized

(a) 1 *Jones & Lat.* 221.

authorized to receive it, and that the purchaser would incur risk by so paying it. It would be neutralizing the effect of the direction contained in the testator's will. Various transactions might have occurred between the trustee and *cestuis que trust*, such as the previous execution of a proper mortgage on sufficient security, to make such payment perfectly legitimate and proper, even if not made to him, as the agent for and with the view of being immediately handed over to the trustee. I see nothing, therefore, in the nature of the transaction itself which should have induced this Court to interfere to set it aside; and I concur with the observation of Lord St. Leonards, that, in such a case, the measure of equity is to support the sale, and at the same time to do justice to the persons entitled under the will.

The considerations which that observation gives rise to I shall refer to after I have observed on the second question, which, I have suggested, arises in the case: namely, assuming the contract to be *bonâ fide* and unimpeachable on the ground of fraud, how it stands, by reason of the purchaser not having obtained the legal estate from the person conveying the land, who was supposed to be, but who was not, actually the trustee under Dr. Spencer's will. On this part of the case, I was strongly pressed by Counsel with the case of *Hicks v. Sallett (a)*, as a conclusive authority to shew, that inasmuch as *Grace Thompson* sold an estate which did not belong to her, the real owner might, when his estate fell into possession, obtain the assistance of this Court to recover it and obtain an account of the rents received.

In my opinion, that case does not apply to the present. That case was to this effect:—The principal question was, whether certain copyhold closes, which had been allotted to the manor before the will of the testatrix,

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(a) 2 De G., M. & G. 782.

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testatrix, passed under the devise of the whether they passed under the residuary devise of the testatrix's lands, which was a devise in trust. The trustees treated the allotments as distinct manor, and as forming part of the residuary estates, and, under this impression, they sold and applied the purchase-money according to the residue, under which the Plaintiff took nothing. The Plaintiff, being entitled in remainder to the land, brought his bill to recover possession of these allotments for an account of the rents, treating the purchaser as trustee for him. The question discussed was the proper construction. No doubt arose in that case as to the propriety of the interference of a Court of Equity. The construction was such as was contended for. Accordingly, a decree was made, restoring the land and giving an account of the rents of it from the time the Plaintiff's title had accrued. The distinction between that case and the present appears to me to be this. In that case, a person having no title to the land acted under a will containing no direction to sell land on behalf of persons who had no interest in the land. A person having no title at all took upon herself to execute the trusts of a will, and sold land on behalf of persons who were the beneficial owners, and applied the money, or professed to distribute the money according to the trusts, which, according to the law, were properly attached to the property. In the former case, persons who sold were wholly strangers to the trust, and had no privity at all with the trust, and could not have been treated as trustees for the trust. In this case, the person who sold acted as the trustee for the beneficial owners, the Plaintiffs, and by so doing made herself liable as a trustee for the Plaintiffs. It has been so declared to be by the decree of the Court. In *Hicks v. Sallett*, the vendors were not liable.

respect, to the Plaintiff: in this case, the vendor was, in all respects, and to the full extent of the purchase-money, liable to the Plaintiffs, and bound to make good to them the full extent of the purchase-money.

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In truth, *Grace Thompson* (to borrow an expression which if not properly admissible conveys my meaning with sufficient accuracy) acted as it were as a trustee *de son tort*, and was declared to be liable accordingly. In such a case, I am of opinion, especially having regard to the length of time which has elapsed, that (to refer again to the expression of Lord *St. Leonards*), "this Court would see if it could do justice to the persons claiming under Dr. *Spencer's* will, and at the same time support the sale," and that this would be the measure of relief, which this Court would deal out. If the money were in the hands of the self-constituted trustee, or if the other estate were liable to make it good, in that case, the distribution of this money would afford the justice his Lordship speaks of. If that money had been paid to the Plaintiffs, they would have already received the measure of justice to which they were entitled; if they had released all claim against her or her estate, that would be equivalent to payment, and would amount to the same thing; and if they have barred themselves from proceedings against her or her estate, that, in my opinion, would also amount to the same thing, and would interpose an insuperable impediment in their way, and prevent their obtaining the assistance of this Court for the recovery of the estate itself.

I entertain this view the more strongly, because I am of opinion, that if this Court compelled the purchaser to restore to the children of Mr. and Mrs. *Norton* the land in question, he would be entitled to all the assistance

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ance which these children and this Court could give him to recover from the self-constituted trustee the purchase-money still in her hands, or for which she might remain liable.

It is clear, therefore, that this part of the case must be regarded exactly in the same manner as if *Grace Thompson* or her executrix had the money now in her hands. This Court would clearly not allow her to retain it for her own benefit, and if she has paid it over to the Plaintiffs, who were entitled to receive it, this Court would equally compel them to account. It is with these observations, and taking this view of the case, that I re-state the dilemma, which I suggested to the Plaintiffs' Counsel at the hearing, to which I received no answer satisfactory to me, and to which, as I believe no satisfactory answer can be given.

The Court has declared, that *Grace Thompson* and her estate became liable to be charged, as a trustee, for the whole amount of this purchase-money, and this Court has actually enforced this liability, so far as relates to the interest of *Catherine Norton* therein, in the suit of *Rackham v. Siddall*. It follows therefore that either the children of Mr. and Mrs. *Norton* are now entitled to enforce payment of the whole of this principal sum from *Grace Thompson's* estate, or that they have, by their own acts, debarred themselves from pursuing that remedy; in either event (if the view I have expressed of this case be correct), they cannot now obtain the assistance of this Court, to take from the purchaser the land itself.

This, in my opinion, disposes of this case so far as the Plaintiffs are concerned, the more so, as it appears from the proceedings, that the estate of *Grace Thompson*

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son is sufficient to pay the whole amount, if it should be established against her.

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As, however, various other considerations arise, on the acts of the parties themselves, and with reference to the relief sought, and the rights of the parties in the cross cause of *Liddell v. Norton*, I shall, very succinctly, express my opinion on the facts proved in evidence, as to the other parts of the case. The evidence shews, that during the life of *Benjamin Norton*, the family were all aware that the whole of the property derived from *Dr. Spencer* had been sold, and that the purchase-money had been paid to *Benjamin Norton*; that part of the proceeds had been invested in the purchase of the *Bawburgh* estate, and that part remained uninvested in the hands of their father. [*His Honor here stated the deeds of the 1st of September, 1826, the 1st of April, 1828, the 2nd of February, 1829, the 6th of March, 1830, and the 20th of April, 1830.*]

It would be difficult, in my opinion, not to hold, that all these deeds adopt the sales *in toto* as *bonâ fide* and good sales. It is said, that the parties executing them did not know, at the time, that *Grace Thompson* was not the heir at law of *William*; but this is not, in my opinion, material, they do not dispute their full knowledge of all other things connected with the sale, viz., that it was *bonâ fide* and for full value, and that the 6,300*l.* had been paid to *Benjamin Norton*, and this was all that it was really material for them to become acquainted with; and the circumstance that, by a mistake, a legal estate had not been conveyed, was not material for the purpose of ascertaining or testing the propriety and *bona fides* of the sales themselves.

I see no trace in the evidence of dissatisfaction with the

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the sales, in respect of any supposed inadequate value, and I doubt much whether any knowledge of fact would have produced the slightest change of deeds in question; it is the insufficiency of *Benjamin Norton's* estate, not the defect in the conveyance, that has changed their views.

In *July, 1837*, *Benjamin Norton* died, and, immediately on his death, a suit of *Greene v. Norton* was filed to administer his estate and obtain payment of various sums due from him. The Plaintiff in this suit was *Mr. Greene*, the husband of *Catherine S. Norton*, he had, at that time, under an indenture of *August, 1823*, executed by his daughter, acquired the whole interest that had formerly vested in his wife in this property, subject to a mortgage made to *Mr. Mason*, another Defendant to the cross cause, but a co-Defendant in the original cause.

In 1846, the suit of *Rackham v. Siddall* was instituted to which I have already referred, and the child of *Mr. and Mrs. Norton* endeavoured to avail themselves of that suit to make the estate of *Grace Thompson* liable to them. There is some uncertainty as to the time when, in these suits, the Plaintiff became aware that *Grace Thompson* was not the heir at law of the testator when she executed the conveyance of *October, 1807*. This was first stated in the answer of the Defendant *Siddall* in *January, 1847*, and if not then disclosed to the Plaintiffs, (who were co-Defendants and endeavouring to assist the Plaintiffs in that suit and avail themselves of it,) it was known to them by the end of 1847 or the beginning of 1848. After this the causes were prosecuted, and it is an observation that occurs throughout the proceedings, that the child of *Mr. and Mrs. Norton* endeavoured to avail them-


of these suits, for the purpose of making *Benjamin Norton's* estate and *Grace Thompson's* estate pay what was due in respect of these transactions. This cause was not abandoned when the defect respecting the sale was known, no notice was given to the purchaser, to inform him of their claim and to assist him in establishing any right he might have either against Mr. *Benjamin Norton's* estate, under the covenants for title or otherwise, or against the estate of *Grace Thompson*.

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Accordingly, on the 13th of August, 1848, both causes came on to be heard before the Vice-Chancellor of England, *Rackham v. Siddall* on the original hearing and *Green v. Norton* on further directions, and then a decree was pronounced, in both causes, enabling the children of Mr. and Mrs. *Norton* to enforce their rights against the estate of *Benjamin Norton*, and also declaring the liability of *Grace Thompson's* estate to make good the claim of the Plaintiff *Rackham*, who was an incumbrancer on *Catherine Norton's* life estate.

The decree proceeds to say, that this decree was "without prejudice to the right of any party claiming under the will of *William Spencer* to resort to the estates sold and conveyed, or affected to be sold and conveyed, by *Grace Thompson*, under the trusts of his will." In my opinion, as I expressed at the hearing and which opinion is confirmed on consideration, these words neither add to or diminish the effect of the decree in this particular case. If the effect of the decree be, that it precludes the Plaintiffs from proceeding against the estate purchased, on the ground that it would be pursuing two inconsistent remedies, I am of opinion that the introduction of these words will not prevent that effect from taking place. Such words may have an important meaning as between parties to the cause,

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who are then present, but when introduced by the parties to the cause, necessarily without discussion, for the purpose of prejudicing some person, not a party to the cause, the words are, in my opinion, wholly inofficious and can give no right and can remove no liability by which an absent person is to be prejudiced.

It is a remarkable proof of the manner in which such words may be either introduced or retained, that, according to the short-hand writer's note of the discussion before Lord *Cottenham*, on the appeal, permission to insert these very words was asked and refused by him, and yet the words, probably originally inserted in the decree, are not removed, absent persons alone being interested in their omission.

I do not think it necessary to go beyond this : that, in my opinion, the children of Mr. and Mrs. *Norton*, who survived her, have in their father's lifetime and since, knowing of the transaction in question, bound themselves by adopting the sale in question ; and that by pursuing remedies inconsistent with that which they now seek, they have debarred themselves from now disputing that sale, and that, consequently, they cannot now disturb it.

This assists and confirms the view I have already stated of this case, viz., that, after this lapse of time, the Court will not compel the restoration of this land, the purchase-money being still available for the purposes of the *cestui que trust*, inasmuch as the estate of *Grace Thompson* appears to be solvent and fully able to make good the amount, to which the Plaintiffs can resort, unless they have precluded themselves from so doing by their own acts.

Maitland's case, however, stands differently from that of the others, he appears to be the mortgagee of *Catherine Spencer Greene*, who died before her mother *Catherine Norton*,

Norton, and who, therefore, would take a vested interest in the estate in remainder in the land, whether unsold or purchased with the trust moneys, but a question of some nicety arises, whether she would take any interest in the produce of the purchase-money not reinvested in land. I do not mean to express an opinion on this point; but, assuming that *Maitland* took no interest in the moneys arising from the sale, it appears to me that he will not be affected by any of the proceedings which have taken place. I cannot give him any relief in the suit of *Hope v. Liddell*, because he is mixed up with the other Plaintiffs, who are, in my opinion, entitled to none, and he does not make, as in fact he was unable to do, any separate case; but in dismissing that bill, I shall do it without prejudice to his filing any bill he may be advised against the Defendant, for the purpose of making the mortgage which he holds of *Catherine Greene's* share in *Dr. Spencer's* estate available against the estate so purchased in 1807.

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With respect to the Defendant *Greene*, I think (notwithstanding that the share of his wife is what is claimed by him), that he is debarred from now proceeding against the estate of *Liddell*, on the assumption that the sale was invalid. The decree of *July*, 1848, obtained by him in the cause in which he was the Plaintiff, as the executor of *Benjamin Norton*, assumes the whole purchase-money of 6,300*l.*, to have been received by *Benjamin Norton*, for which his estate is made liable: it treats the sale as valid, adopts it, and administers his estate on that footing: and, in my opinion, he cannot now turn round and say, that no sale took place and that such decree ought never to have been obtained in that form, and that it is inconsistent with the real facts, which he was himself fully acquainted with, at that time, when he asked for and obtained that decree.

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I am also of opinion, upon the principles I have stated that, in the cross cause, the Plaintiffs *Liddells* are entitled to an injunction, restraining the action of ejectment generally against all the Defendants, including the Defendant *Maitland*. I am of opinion, that he must be left to Equity to establish his claim to the extent of his mortgage security, if he can, and that to permit him to bring an action, if it could be maintained might enable the Defendant *Greene* to obtain, through him, a benefit to which, in my opinion, he is not entitled

I shall dismiss the first bill of *Hope v. Liddell* with costs as against the *Liddells*; but I shall make the decree, in the cause of *Liddell v. Norton*, for a perpetual injunction to restrain the ejectment and without costs, as I am of opinion that it has become, in a great degree, necessary in consequence of the negligence of the purchaser of the hereditaments in the first instance not having made proper inquiries, but having proceeded on the erroneous belief common to all parties to the transaction.

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CAREW v. DAVIS.

Dec. 8.

THE usual order was made for the deposit, by the Defendant, who was the acting steward of a manor, for the inspection of the Plaintiff, of all documents, &c., in his possession. Part of them consisted of the court rolls of the manor. An application was made, that the court rolls might be examined, instead of being deposited.

The usual order was made for the deposit by the Defendant of all documents in his possession. Some of them consisted of the court rolls of a manor, of which the Defendant acted as steward, but his right to that office was contested. The Court released the Defendant from the necessity of depositing them in Court, and ordered the production at the steward's.

Mr. Giffard, for the Defendant.

Mr. R. Palmer and *Mr. Southgate*, for the Plaintiff, contested the right of the Defendant to act as steward.

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I think that if this matter were before me in the first instance, I should not have compelled the deposit in Court of the court rolls, though I should have allowed them to be inspected, at all reasonable times, at the office of the solicitor or at some other convenient place; I certainly should not take away the court rolls from the acting steward, for though they may not be absolutely required at the present time, they may be required at any moment. Here is a person who is said not to be the steward, but to be acting as steward; I cannot determine his right to the office upon an interlocutory proceeding. The Court considers that the person depositing documents has the right to the possession of them, and the custody of the Court is that of the person making the deposit. In the case of merchants' books, it is a question of convenience and inconvenience; the same principle is applicable to court rolls, and I must direct the production to be at the steward's in London.

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ROBINSON v. WHEELWRIGHT.

Dec. 18, 20.

Where there is attached to the separate estate of a married woman a clause against anticipation, the Court has no power to release it from that restraint, even in cases where it would manifestly be for her benefit to do so.

Thus where a testator gave a married woman a legacy, on condition that she conveyed, within twelve months, her separate estate, which was subject to a restraint against anticipation, to B. and C., the Court held, that effect could not be given to the bequest, though highly beneficial to the *feme covert*.

Where a legacy is given on condition, it must be

strictly and literally performed; but where a bequest was made to A., on condition that he conveyed his estate to B. and C., in such shares as shall be determined by [blank], it was held, that the gift was not rendered ineffectual by reason of the blank.

MICHAEL HOYLE devised to trustees and the heirs his mansion-house called *Grove*, and the lands thereto belonging, ("including the *Laithfields* theretofore belonging to the *Turna Top* farm, and a plot or allotment of land situate near *Turna Top*, and lately by me enclosed from the commons of *Rishwort*, aforesaid, and both now occupied with the said messuage called *Grove*,") upon trust to pay the rents to the Plaintiff *Ann Hoyle Robinson*, for her separate use "and so that she might not be able, in any manner to assign over, charge or anticipate the same," and after her decease, in trust for her children as she should by will appoint, and in default, in trust for her first and other sons successively in tail, and in default, to her daughters as tenants in common in tail.

The testator died in 1851.

John Wheelwright (the brother of the first testator and the father of *Ann Hoyle Robinson*), by his will made in 1854, expressed himself as follows:—"Whereas my daughter *Ann Robinson*, the wife of *John Robinson*, having been amply provided for by my late brother *Michael Hoyle*, I give to her the sum of 1,300*l.*, to be paid to her by my executors, only upon condition, that she or her said husband shall give up and absolute conveyance of the said sum of 1,300*l.* to the said trustees."

convey, or cause to be conveyed, all his, her or their estate and interest in the encroachments made by my said brother upon the common or waste lands in *Rishworth* aforesaid, adjoining upon the *Booth* farm and the *Turna Top* farms in *Rishworth* aforesaid and devised by my said brother *Michael Hoyle* unto my said daughters *Elizabeth* and *Sarah*, in such shares and proportions as shall be determined by the share to be allotted to *Elizabeth* to be conveyed to *John Dyson* and *Thomas Dyson*, upon such and the same trusts as are hereinbefore declared in favour of the said *Elizabeth Lockwood* and her children, and the share to be allotted to the said *Sarah Horner* to be conveyed upon the same trusts as are declared under the will of my said brother with respect to the *Booth* farm in favour of the said *Sarah Horner*. And I hereby expressly declare, that if the above conditions are not or cannot be complied with, within twelve months after my decease, then that such sum of 1,300*l.* shall not be paid to my said daughter *Ann Robinson*."

1855.

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WRIGHT.

John Wheelwright died on the 10th of *January*, 1855. *Ann Hoyle Robinson* had four children, who were infants.

This suit was instituted by Mr. and Mrs. *Robinson* against the trustee of the first testator, the executors of the second testator, and the Plaintiff's four children, alleging that the Plaintiffs were desirous of performing the condition in the will of *John Wheelwright*, so as to entitle themselves to the legacy of 1,300*l.* and for that purpose, they were willing to do any act, or to execute or to cause or procure to be executed, any conveyance, surrender or other instrument that might be necessary or proper; but the executors alleged, that on account of

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of the interest of the Plaintiff *A. H. Robinson* in the said encroachments being inalienable, the performance of the condition was impossible; and that the said legacy would, therefore, never become payable.

The bill also stated, that the encroachments were of the value of 120*l.* or thereabouts, and that it would be greatly for the benefit of the female Plaintiff, as well as of the infant Defendants, that such encroachments should be given up in consideration of the sum of 1,300*l.*, which the Plaintiff *John Robinson* submitted to settle, as the Court might direct, for the benefit of his wife and children.

The bill prayed a declaration as to the construction of the will of *John Wheelwright*, and that, on the Plaintiffs' &c., their trustee, executing such deeds, and doing such acts as the Court might think requisite for the due and full performance of the said condition (which they submitted to do), the executors of *John Wheelwright* might be decreed to pay the 1,300*l.*

Mr. *R. Palmer* and Mr. *Wickens*, for the Plaintiffs. The Plaintiffs, with the sanction of the Court, have full power of complying with the condition. The restraint against anticipation is the only obstacle; this is a creation of equity, introduced for the protection of married women; the Court can modify it, and will not allow a restraint, intended merely for the benefit of a *feme covert*, to operate to her disadvantage. The Court can, in cases of compromise and election, commute the inalienable interest of a married woman, and it can equally do so in the present case, where it is evidently for her benefit. If it were otherwise, a *feme covert* could not give up her interest in a shilling,
if

if settled on her without power of anticipation, even if it would produce her thousands.

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There is no difficulty as to the conveyance, for the legal estate is vested in the trustee, who is before the Court, and is willing to act as the Court may direct, he may be directed to hold the property on the trusts declared by the decree. As to the blank for the name of the trustee, that forms no part of the condition, and the non-exercise of a discretion will not affect the validity of the gift.

Brown v. Higgs (a); *Fordyce v. Bridges (b)*, were referred to.

Mr. *Amphlett*, for the Plaintiff's children.

Mr. *Follett* and Mr. *Cairns*, for the executors. The condition cannot be complied with, for a married woman has no power to alien her inalienable interest, nor can the Court release her from the restraint, imposed not by the second but by the first testator; *Field v. Brown (c)*. Though the Court has created the fetter it cannot annihilate it. If it were otherwise, a married woman would equally have the power, with the approbation of the Court, of selling an estate settled on her without power of anticipation, if a tempting offer were made, and the Court could also enable her to dispose of a reversionary interest in a *chose in action*; but this the Court has repeatedly refused to do.

Conditions must be strictly complied with (*d*). Here the conveyance is to be made, "in such shares and proportions

(a) 5 *Ves.* 495.
(b) 2 *Phillips*, 497.

(c) 17 *Beav.* 146.
(d) *Shepp. Touch.* 144.

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 WRIGHT.

portions as shall be determined by .” There being a blank and an omission of the name, the performance of the condition is impossible.

Mr. *Wickens*, in reply.

Boyce v. Boyce (a); *Roundel v. Curren (b)*, were also referred to.

Dec. 20. *The MASTER of the ROLLS.*

This is a case of great singularity, though, in fact, it is an ordinary suit for the payment of a legacy, and the question is, whether the Plaintiffs are entitled to it. It is given upon the performance of a condition, and unless that condition be performed, the legacy is not given. I regret to say, that although I have endeavoured, by every means in my power, to make out the title of the Plaintiffs to the legacy, I have been unable to do so.

The state of the case is this: the uncle of the Plaintiffs, *Michael Hoyle*, made a will to this effect:—[*His Honor here stated it.*]

In the first place, I do not consider the circumstance that the shares are to be determined by a person, whose name is left in blank, in the slightest degree affects the question. I am satisfied that this forms no part of the condition, which is, that the estate shall be conveyed to *Elizabeth* and *Sarah*, and “the shares and proportions,” in which they are to be determined is a subordinate matter after the gift is complete, and which forms
 no

(a) 16 *Sim.* 476.

(b) 2 *Bro. C. C.* 67.

no part of the condition. Consequently, I think that *Brown v. Higgs*, and that class of cases, apply.

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But that is not the principal difficulty; though it is admitted that the extent of *Ann Robinson's* interest is not material, it is admitted that she has an interest in one, at least, of these encroachments; whether it is a freehold or a chattel interest is of no importance. At one time, I thought, that the condition might be performed by her conveying all the interest she had. It is true that it would pass nothing, but still that it might be a performance of the condition, and that if she did what she could for that purpose, and conveyed, or caused to be conveyed, all her estate and interest, it would be sufficient. But, on further reflection and consideration, two things induce me to think that is not the right construction. In the first place, I think this condition must be literally performed. I think that not only the cases, but the principles, relating to conditions require, that they shall be exactly and literally performed as the testator requires them, and that if he requires a condition to be performed which is not repugnant to the interest which he gives (of course there are qualifications which it is not necessary to detail), the condition must be strictly and literally performed. Now, the meaning of this clause is, that the condition on which the legacy shall take effect is, that whatever interest there may be in *Ann Robinson* shall be *bonâ fide* conveyed to *Elizabeth* and *Sarah*. Now that she has an interest is quite certain, because, although she cannot anticipate it, she has an interest for the whole of her life, and if the clause had stood there, I should have been disposed to think, that she might have performed the condition, by conveying *de anno in annum* all the interest which she had as it accrued due. But it is obvious that she cannot convey anything more than that, because the will

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will of *Michael Hoyle* has expressly determined that she shall not. It is said, that these cases of separate use and restraints upon anticipation are mere creatures of equity, and that therefore a Court of Equity may deal with them as it thinks right. It is no doubt true that they have arisen from the doctrines laid down by the Judges who have presided in Courts of Equity; but so have all trusts, and it does not therefore follow, that the Court can dispense with or mould this fetter as and when it thinks fit. I concur in the argument urged by Mr. *Follett*, that if the Court could, on the present occasion, dispense with it, because it is for the interest of *Ann Robinson*, it might and would, in like manner, be dispensed with, if a person offered to give her three times the value of the property to settle it on the same trusts, provided she conveyed her separate and unalienable interest in the property. But I am of opinion that she could not so convey it: the first testator has thought fit to impose certain fetters on his property, which are sanctioned by the law of *England*, and which it permits a testator to impose; those fetters remain and make the property in the hands of the devisee or legatee absolutely inalienable for any consideration whatever.

I have already said, that if the matter had stood upon the first clause alone, as the interest accrued *de anno in annum*, I should have thought it might have been conveyed; but there is a proviso at the end of the will, which makes that absolutely impossible, because the testator says "I hereby expressly declare, that if the above conditions are not, or cannot be, complied with, within twelve months after my decease, then that such sum of 1,300*l.* shall not be paid to my said daughter *Ann Robinson*." Having, therefore, expressly stated what the condition is, he anticipates a difficulty in the performance of it, and he says, if it be not performed

formed within twelve months, then the legacy shall fail, and shall fall into the residue. I was certainly sincerely desirous that this legacy should take effect; at one time I thought, that if the legatee did everything that lay in her power to carry it into effect, that that would be sufficient; but this proviso is inserted expressly to meet that very case; for it not merely says, "if the conditions are not complied with," but if they "cannot be complied with."

It may be said, that this is a very capricious will, and that the Court would discountenance a testator's inserting into a will a sort of legacy, which holds out a promise to the ear and breaks it to the hope, and frustrates the expectation which it creates. I concur with the observation, but I cannot deal with a will of this description in any other way than by applying such rules of law as are strictly applicable to it.

It was then suggested that I might deal with this case in the same way as in cases of election and of compromise; that, for instance, I might deal with the case in this way, treat it exactly as if the testator had, without imposing any condition whatever, absolutely devised or bequeathed this piece of land, which had been taken by encroachment from the waste, to Sarah and Elisabeth, the two daughters; in which case the Court would have found it was for the interest of *Ann Robinson* to take under the will rather than against it, and thereupon I might have carried it into effect in that way. No doubt the Court might, in this way, have done it, and, giving the legacy to *Ann Robinson*, it might have enjoined and prevented her from interfering with the property ever afterwards, so that the beneficial interest would, in point of fact, have gone to Sarah and Elisabeth.

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beth. But I cannot hold that those cases apply to this condition, which directs, that the property shall be absolutely conveyed, which is a perfectly separate and distinct condition; and, if this cannot be done out of Court, I am not aware of any principle which can enable this Court to give authority to *Ann Robinson* and her husband, or to any legatee whatever, to do that which out of Court is prohibited by law. If I could, as *Mr. Follett* justly observed, I could also sanction the sale of the property.

The result is, that I am of opinion that the condition cannot be complied with, and that therefore the Plaintiffs cannot make a title to this legacy.

NOTE.—Affirmed by the *Lords Justices* 18th *March*, 1856.

Dec. 22.

WILDING v. BOLDER.

The Master of the Rolls, except in cases of absolute necessity, will not appoint a near relative of the parties interested to be a trustee.

MR. CAIRNS appeared in support of a petition to appoint new trustees, one of whom was related to the *cestuis que trust*.

The MASTER of the ROLLS.

I cannot depart from the rule I have adopted of not appointing a near relative a trustee, unless I find it absolutely impossible to get some one unconnected with the family to undertake that office.

I have always observed, that the worst breaches of trust are committed by relatives, who are unable to resist the importunities of their *cestuis que trust*, when they are nearly related to them.

1856.

MALCOLM v. MALCOLM.

Jan. 16.

THE testatrix, (in an event which happened,) bequeathed the residue of her money in the funds, &c. as follows:—"unto *John Malcolm* and his assigns, for his life, and, after his decease, I give and bequeath the same to his eldest son for ever. But in case the said *John Malcolm* shall die under age and without issue, I then give and bequeath the said residue of my said money in the funds," &c. unto *Mary Ann Martha Malcolm* absolutely.

Bequest to *A.* for life, and, after his decease, to his eldest son; but in case *A.* should "die under age and without issue," over. Held, that the word "and" was not to be read "or," and that *A.*'s son, in his father's lifetime, took a vested interest, not subject to be divested.

In 1830, *John Malcolm* instituted the suit of *Malcolm v. Taylor*, to establish the will and have it carried into execution. It was, in that suit, decided (a), that *John Malcolm* was entitled to the legacy for life only.

John Malcolm had five children, the eldest of whom, *John Wingfield Malcolm*, attained twenty-one in 1854. A fund of upwards of 80,000*l.* was now standing to "The account of the Plaintiff *John Malcolm*, subject to the trusts of *Maria Taylor's* will." *John Malcolm* and his eldest son, *John Wingfield Malcolm*, filed this bill against the representatives of *Mary Ann Martha Malcolm* praying a declaration, that *John Wingfield Malcolm* was absolutely entitled to the fund, subject to his father's life interest, and that the Plaintiffs conjointly were now entitled absolutely to dispose of it.

Mr. *Freeling*, for the Plaintiff, argued, that, subject to the father's life estate, there was, in the first instance,

an

(a) 2 *Russ. & Myl.* 416.

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 v.
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an absolute vested gift in his eldest son, which could only be defeated by the happening of two events, viz., by *John Malcolm* dying under age, and by his dying without issue. That it was now impossible that the former event could ever happen, and that, therefore, the Plaintiffs were together absolutely entitled to the fund in Court; *Campbell v. Harding* (a); *Pearson v. Rutter* (b).

Mr. *Webb*, *contrà*. The gift to the "eldest son" means to the son who might be the eldest at *John Malcolm's* decease, and if there should be no son then living, the legacy will go over; *Byran v. Collins* (c); *Driver v. Frank* (d). Secondly, the word "and" must be read "or," and the gift over would take effect on the happening of either of the two events.

The principle of all the decisions is to let in a class, but the effect of the Plaintiff's argument is to exclude them. 1 *Jarman* on Wills (e) was also cited.

The MASTER of the ROLLS.

I feel some reluctance in deciding this case, because I think there may be some persons not before the Court who may be interested in it. But as I feel no doubt on the construction, I think I may, under these circumstances, make a declaration of what I consider the rights of the parties.

I think that the eldest son of *John Malcolm* has a vested interest in the property, which is not liable to be divested. There were two events, the happening of which

(a) 2 *Russ. & M.* 390.

(b) 3 *De G., M. & G.* 398.

(c) 16 *Beav.* 14.

(d) 3 *Maule & S.* 25.

(e) *Page* 428 (2nd ed.).

which was to give an interest to *Mary Ann Martha Malcolm*, and it is now impossible that they can both take effect. The gift to her was "in case *John Malcolm* shall die under age and without issue."

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MALCOLM
v.
MALCOLM.

I am of opinion that this is not a case for reading "and" as "or." I think that the gift over cannot take effect, and that the eldest son of *John Malcolm* takes a vested interest in this legacy, and could deal with it as he pleased as soon as he attained twenty-one.

I will make a declaration that *John Wingfield Malcolm*, as eldest son of *John Malcolm*, is entitled to a vested interest in this sum, subject to his father's life estate.

LIVESEY v. HARDING.

1855.

Nov. 28.
Dec. 3.

THE testator, *Edmund Livesey*, died in 1823, leaving five children, viz., *Edmund*, *James*, *Harding*, *Mary* and *Elizabeth*. By his will, he devised his real estate to trustees, upon trust, to receive the rents during the widow's life, and, at her decease, to pay them 1,000*l.* a piece. Subject thereto, *A. B.* was absolutely entitled to the estate. In a suit for the performance of the trusts, the estate was sold, and a fund was set apart to provide for the widow's dower, which was ordered to be charged with the legacies payable at her death, and *A. B.* was declared entitled to the remaining fund. The widow died in 1854, and no provision having been made for the children's maintenance under the discretionary direction, a younger child sought to obtain payment out of the dower fund, but the Court held, that whatever his rights might be they had been concluded by the previous orders made in this cause.

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the life of his wife, and pay her dower thereout, and then discharge the money borrowed or to be borrowed on his estates, and "to pay and apply a moiety of the residue of the rents and profits, or such part of a moiety as they or he in their or his discretion should see fit, in the maintenance, education, bringing-up or advancement in life of such younger children or child as he should leave at the time of his decease, as to them or him should seem eligible, during the natural life of his wife;" and, on the decease of his wife, to raise by mortgage a competent sum to pay his younger children 1,000*l.* a piece. Subject to these gifts, the testator devised his estates in such a manner that, in 1827, his daughter *Mary* became entitled thereto absolutely.

In *December*, 1823, *Harding Livesey* and *Mary Livesey*, by their next friend, instituted the original suit of *Livesey v. Harding* (a) against the trustees, the testator's widow and the other children, praying the establishment of the will, the performance of the trust, and that the younger children might be declared entitled, during the life of the widow, to a moiety of the rents of the estates, after paying the interest upon the incumbrances and the dower of the widow.

At the hearing in *July*, 1830, the will was established, the trusts thereof were ordered to be carried into execution, and the accounts prayed were directed to be taken.

Under an order of *February*, 1833, the estates were sold free from dower with the consent of the widow and of the mortgagees (b).

By

(a) *Tamlyn*, 460 and 1 *Russ.* (b) 1 *Beav.* 344.
 & *Myl.* 636.

By orders made in the cause on the 3rd of *August*, 1837, and the 5th of *August*, 1839, the mortgagees were paid and a sum of 11,446*l.* 8*s.* 10*d.* stock was carried over to the "Dower Account of the Widow," and the dividends were directed to be paid to her for life, and after her death it was ordered, that this fund should stand charged with the payment of the younger children's legacies, which would then become payable; and it was declared, that *Mary Livesey* was absolutely entitled to any bank annuities and cash which should be remaining on the credit of these causes after the sales, carrying over, and payments thereinbefore directed. Various other orders and directions were made, but no notice was taken of any right of the younger children to a moiety of the rents and profits of the estates, or of the income of the proceeds thereof for their maintenance.

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v.
HARDING.

One of these orders had been enrolled, and the residue of the fund had been carried over to *Mary Livesey's* separate account.

In *May*, 1854, the widow died.

Harding Livesey now presented a petition asking an inquiry as to the surplus proceeds of the sale of the estates, after setting apart the fund to answer the dower and discharging the incumbrances and costs of suit; and also as to the amount of the income, which had or might have arisen from the investment of the surplus in consols, from the time of the death of the surviving trustee to the decease of the widow, and as to the sum which the Petitioner was entitled in respect of his share of such income, and that such share should be raised out of the 11,446*l.* 8*s.* 10*d.*, together with his 1000*l.* legacy, and interest thereon at 4*l.* per cent. from the death of the widow, and paid to him with costs. He stated, that he did

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did not ask any inquiry anterior to the death of the surviving trustee, because the discretion of the trustees existed up to that time, and that he had not made this claim before out of regard to *Mary Livesey* (who was a lunatic), whose means of support until the death of her mother he did not wish to curtail.

There was another petition on behalf of *Mary Livesey* praying payment of the legacies and that the rest of the dower fund might be carried over to her separate account.

Mr. *Pownall*, for *Mary Livesey*. The fund provided for the payment of the widow's dower being released by her death, is now applicable to the payment of the children's legacies, and, subject thereto, belongs to *Mary*, as the owner of the estate sold.

Mr. *Josiah Smith*, for *Harding Livesey*. By the directions in the will, the trustees were to apply a moiety of the rents for the maintenance of the younger children. This was an imperative trust, which did not cease on the children's attaining twenty-one, or on their deaths, but continued during the life of the widow; *Badham v. Mee* (a); *Webb v. Kelly* (b); *Kilvington v. Gray* (c).

They, and their representatives, are now entitled to a sum equivalent to half of the rents, to be paid out of the fund in Court.


Mr. *Lloyd*, Mr. *Waller*, Mr. *Cairns*, Mr. *Baggallay*, for other parties.

Mr.

(a) 1 *Russ. & Myl.* 631.
(b) 9 *Sim.* 469.

(c) 10 *Sim.* 297.

Mr. Pownall, in reply, and in opposition to the claim of *Harding Livesey*, argued, that as the bill asked a declaration on the very subject, and as none had been made, the point must be taken to have been disposed of. That nothing was payable except through the discretion of the trustees, and nothing having been paid for a series of years, it must now be assumed, that the trustees had exercised their discretion and considered that nothing was necessary. That the orders, particularly those of 1837 and 1839, were quite inconsistent with the present claim, which could not succeed until they had been reversed.

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Mr. Josiah Smith, in reply, on the petition of *Harding Livesey*. There has been no waiver of right, but a mere postponement in enforcing it until the death of the widow, for the convenience of *Mary Livesey*, the lunatic, and notwithstanding the prior orders, now that there appears to be in Court a fund to pay, it ought to be made available. It was unnecessary that the former orders should save the rights.

The MASTER of the ROLLS.

I will consider the case. I am afraid that the orders do not simply pass by, but that they are inconsistent with the present claim.

The MASTER of the ROLLS.

Dec. 3.

Having carefully considered these orders of the 3rd of August, 1837, and the 5th of August, 1839, I am of opinion that they have concluded the question before me, and that the Court has, in fact, in this cause judicially excluded the claim of the younger children to a moiety of

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of the rents, and of the dividends of the stock, which is the produce of the real estate. The only sums which are charged on the dower fund are the legacies payable after the death of the mother. This is shewn by the contents of both orders, and the latter contains an absolute declaration of the right of the surviving daughter to everything after these payments have been made. Some other orders in the cause have also been furnished to me, but they do not advance the matter further than this :—that they all seem to proceed on the assumption that the rights of all parties have been fully ascertained and settled, by the decrees and orders in the suit.

Had the matter been open, an important question might have arisen, as to whether the maintenance is limited to the minority, or extended to the whole life of the widow, and as the trustees have not exercised their discretion in ascertaining the amount to be paid, whether this Court would not consider it a simple trust to be executed. On this point, however, I purposely abstain from expressing any opinion, thinking that the question is concluded by the two orders of *August*, 1837, and *August*, 1839, which have been acted upon from that time down to the present ; I am consequently compelled to say, that I can make no order on this petition : I do not, however, think that this is a case for costs.

1855.

THE ATTORNEY-GENERAL v. BLIZARD.

Nov. 6, 7.
Dec. 4.

THIS was an information, filed by the *Attorney-General*, upon the certificate of the Charity Commissioners, against the vestry of the parish of *Richmond*, in *Surrey*, setting forth a local act of the 25 *Geo. 3*, c. 41, constituting vestrymen of the parish, with power to build a workhouse and employ and maintain the poor, and authorizing their majesties to grant to the vestry a part of "the *Pest House Common*," and the "*Hill Common*," discharged of all right of common, for building a workhouse thereon, and appropriating a new burial-place for the parish.

Under the powers of an Act of Parliament, assented to by the Crown, as lord of a manor, and by the commoners, King George the Third granted to the vestry of *Richmond* a portion of the common, for a workhouse, a cemetery, and "in trust for the employment and support of the poor of the said parish." Held, upon the construction of the act and the grant, that, although this was a charity, the income might properly be applied in aid of the poor-rates and so in relief of the parish.

The information then set forth a grant of their majesties, dated the 18th of *October*, 1786, conveying thirty-three acres of the commons:—"In trust, as to that part of the said common called *Pest House Common*, thereby granted, for the purpose of building a workhouse on part thereof, and for appropriating other part thereof for a new burial-place for the parish, in case the said vestrymen, or any thirteen or more of them, should deem any part of the aforesaid common, called *Pest House Common*, thereby granted, fit and proper for a burial-ground; and as to the other parts of the said commons, called *Pest House Common* and the *Hill Common* thereby granted, in trust for the employment and support of the poor of the said parish." To be held of the crown at a yearly rent of 7s.

Part of the lands thus granted were appropriated as a site of a workhouse, part for a new burial-ground, and the

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the rental of the rest, which amounted to 488*l.*, and was expected hereafter greatly to increase in value, was "applied in aid of the police, poor and other rates, and for defraying the expenses of registration of voters and the ordinary charges and expenses of the parish."

The Inspector of Charities having reported the matter to the Commissioners, application was made to the vestry, suggesting the impropriety of the present mode of applying the income of the Charity, and the necessity of adopting a scheme for its application exclusively for the poor of the parish. The vestry replied as follows: "The vestry consider that the grant of the land was intended to go in aid of the rates, inasmuch as it is stated to be for the purpose of building a workhouse thereon, for a burial-place, and for the employment and support of the poor, all of which purposes must otherwise have been performed at the expense of the ratepayers. And moreover, as a consideration for the grant, the freeholders and copyholders gave up their rights, and the inhabitants generally surrendered other and very important rights. The vestry, therefore, consider that the land is not within the meaning of the charities to which the Charitable Trust Act applies. With respect to any scheme, therefore, for the future application of the rents, the vestry are of opinion that they cannot depart from the uses pointed out by the grant, one of which, the providing a burial-ground, is now in active execution."

In evidence of this being a charity, the information alleged, that in 1844, an application had been made to this Court for a scheme for granting building leases, which was done in 1845; and that the whole of such proceedings were intituled "In the matter of the

Richmond

Richmond Parish Charity Land, and of the said special Act."

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The information prayed a declaration, that the present application of the income was inconsistent with the Act and grant, that no part of the income ought to be carried to the general account, or applied in aid of any of the rates, or applied in discharge of any of the general charges and expenses of the parish, that the same ought to be applied exclusively for the benefit of the poor of the said parish, and for a scheme.

This being the outline of the case, it is now necessary to go through the provisions of the statute of the 25 Geo. 3, c. 41, in detail. The previous Act, in substitution of which the act in question was passed, was the 6 Geo. 3, c. lxxii, and the title of it was this:—"An Act for the Relief and Employment of the Poor, and for repairing the Highways, Paving, Cleansing, Lighting and Watching the Streets and other Places in the Town and Parish of *Richmond*, in the County of *Surrey*, and for removing and preventing Annoyances, Obstructions and Encroachments therein, and for shutting up a Road from the late *Horseferry* at *Kew* to *West Sheene Lane*, near *Richmond Green*; and for amending and keeping in repair the Road from *Kew Bridge* to *Richmond*." [Of this Act the Court, in giving judgment, observed, "It was passed merely for parish purposes, and all the clauses in it related exclusively to parish purposes, with the exception of shutting up the road."]

The Act of 25 Geo. 3 was thus intituled:—"An Act to repeal part of the Act passed in the Sixth Year of his present Majesty for the Relief and Employment of the Poor of the Parish of *Richmond*, in the County of *Surrey*, and other Purposes in the said Act mentioned,
and

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and for making new Provisions for the Relief and Employment of the Poor, for the Repairs of the Highways, the Paving, Cleansing, Lighting and Watching the Streets and other Places in the Town and Parish of *Richmond* aforesaid, for the Removal and Prevention of Annoyances, Obstructions and Encroachments therein, for inclosing certain Commons or Waste Lands within the said Parish for the Use of the Poor, and to enable the Vestrymen of the said Parish to erect a Workhouse thereon, and to purchase Land for a Burial Ground, and also to enable his Majesty to shut up a Lane within the said Parish called *Love Lane*." The preamble, after referring to the previous Act, proceeded as follows:—
 "And whereas, since the passing the said Act, great inconveniences have happened, and the several provisions in the said Act respecting the relief and employment of the poor, the repairs of the highways, the paving, cleansing, lighting and watching the streets and other places in the said town and parish of *Richmond*, and the removal and prevention of annoyances, obstructions and encroachments thereon, are found ineffectual to answer the purposes thereby intended." [The title, said the Court in its judgment, therefore, and the preamble of the Act, pointed solely and exclusively to parochial purposes.] The 2nd clause appointed certain vestrymen of the parish; the 3rd provided for the meeting and election by the inhabitants; the 4th and the subsequent, down to the 20th, related to their qualifications, powers, duties, mode of contracting, their proceedings, their meetings, the payment of the money received to the treasurer; the 20th and 21st sections directed them to appoint collectors of the rates and assessments, and a treasurer; the 22nd "authorized and required" the vestry, annually, to make two distinct rates, one for the relief of the poor, and the other for repairing the highways, upon the inhabitants of *Richmond*.

mond. The subsequent sections specified how the rates were to be paid and be recovered; the 29th enabled them to appoint watchmen; the 31st enabled the vestrymen to regulate the lighting of the town; the 32nd imposed fines on persons breaking the lamps; the 33rd to the 36th related to the repairing and keeping clean the streets; the 37th related to the payment of the expenses of watching, lighting, cleaning and repairing the streets and highways out of the rates.

It will be observed that, up to this point, this was a mere Act for regulating the affairs of the parish, and was closely confined to that purpose.

Then came the 38th section, which was as follows:—after reciting that the lease of the present workhouse of the parish was near expiring, and the building was very much out of repair and unfit for the purposes for which it was then used, and that their Majesties were willing to grant part of the commons for the erection of a proper workhouse thereon, it was enacted, that the vestry should have power, and were authorized, “to erect and build, upon any part of the commons” so to be granted “one or more houses for the better receiving, maintaining and employing the poor of the said parish,” and the vestry were empowered to contract for building such workhouse, “and also to purchase or provide, either by contract or otherwise, from time to time, such furniture, goods, chattels, provisions, clothing, utensils and materials whatsoever, as shall be thought proper, for the effectual setting to work, receiving, employing, maintaining, clothing and providing for, in every respect, the poor of the said parish, of what age, sex or condition soever they be,” and pay what should become due thereon. And the vestry were empowered to purchase land convenient for a burial-ground. The 40th vested the property of every description, for the time being, in the

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the workhouse, in the vestrymen ; the 41st empowered the vestry to borrow 3,000*l.* on the rates raised “for the relief of the poor,” and the following clauses to the 46th related to the securities to be given, and the mode of liquidating the same out of the rates ; the 47th enabled the vestrymen to apprehend and send to the workhouse vagrants, &c. ; the 48th directed that such persons should be kept to work ; the 49th gave a power to punish the paupers in the workhouse ; the 50th imposed penalties for misconduct of officers ; the 51st authorized and empowered the vestry to keep, maintain and employ, &c., “in any works, trades, manufactures and employments whatsoever, all and every the poor maintained in any workhouse or workhouses, and shall and may provide a convenient stock of flax, hemp, wool, cotton, thread, iron, stone, wood, leather, or other materials for the employment of the poor received into such house or houses, and for that purpose only” to set up, &c., any trade, &c., in such house, and sell the goods manufactured, &c., by such poor in such workhouse. The 52nd was in these words :—“And be it further enacted, that all moneys arising from any work or labour done by the poor in such workhouse or workhouses shall go *in aid of the poor's rate* and other moneys raised for carrying this Act into execution, and shall be made use of for the purposes therein contained.” The next section enabled the vestry to punish the poor in the workhouse refusing to work, and to reward the meritorious ; the 56th and 57th related to the relief of the casual poor ; the 59th directed the penalties be paid to the treasurer, and applied to the purposes of the Act ; the 60th specified the mode of recovering them.

The 62nd clause was that on which the information relied, and was to this effect, “and whereas there are two commons or parcels of waste ground situated in the
 manor

manor of *Sheene*, otherwise *West Sheene*, otherwise *Richmond*, one known by the name of *Pest House* Common, and the other by the name of the *Hill* Common, which commons have long continued in an uncultivated state, and have been of little use or advantage to those having a right of common in the manor aforesaid;" and reciting a grant in 1770, of the manor of *Sheene* to Queen *Charlotte* for life; and reciting that their Majesties were willing to grant, "and the freehold and copyhold tenants having a right of common were desirous to inclose, such parts of the said commons as may be deemed necessary for building a workhouse thereon, and for appropriating ground for a new burial-place for the parish of *Richmond*" (in case the vestry should deem part of the said commons fit and proper for a burial-ground), "and for the employment and support of the poor of the said parish," IT WAS ENACTED, that their Majesties might grant and convey to the vestry "such parts of the said commons as should appear and be deemed necessary for the purposes before mentioned;" and the vestry was authorized after the making the grant to inclose the parts of the common granted "for the purposes before mentioned, or either of them, and such parts of the said commons so inclosed and divided shall be and shall be considered as the sole and exclusive property of the vestry of the parish of *Richmond*," and should be held by the vestrymen for ever, discharged from all right of common whatsoever, "in trust for the purposes before mentioned or either of them."

The 65th and 66th sects. directed, that the poor of *Kew* should be received into the workhouse to be built at *Richmond*, and treated in the same manner as the poor of *Richmond*; the 68th enabled the King to shut up a lane or footway called *Love Lane*, leading from the north end of *Richmond* to *Kew*, and the last section made it a public Act.

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The information now came on upon a motion for a decree.

The Solicitor-General (Sir *R. Bethell*), and Mr. *T. H. Terrell* in support of the information. This is strictly a charity, to be administered by the vestry of *Richmond*. This property is held by them expressly "in trust," and the objects of the trusts are defined to be the poor, and for the supply of materials for their employment. The 62nd section of the act is express; the common when granted is to be held "*in trust* for the purposes before mentioned, or either of them," and those purposes are in the previous section stated to be: first, for building a workhouse; secondly, to provide a new burial-ground; and thirdly, "for the employment and support of the poor of the said parish."

The grant by the King follows the terms of the act; the property is to be held "in trust" to build a workhouse, and provide a burial-place on the *Pest House* Common, and as to the other parts "*in trust* for the employment and support of the poor of the said parish."

This being the charitable trust, it must be an improper disposition of the rents to apply them in aid of the poor-rates, by which the trustees and other rate-payers are relieved and benefited, or towards the general charges and expenses of the parish. In the *Attorney-General v. The Corporation of Rochester (a)*, the trusts were to apply the rents for a provision for flax and hemp, and other necessary stuff to set the poor of the said city at work, according to the statute of the 18th *Eliz.*; the Court considered, that the employment of the surplus rents in payment of the parish and borough rates was improper, and could not be allowed to be continued, and a scheme was directed.

The

(a) *Master of the Rolls*, 25 July, 1853; affirmed by the *Lords Justices*, 16 Feb. 1854; and see *Attorney-General v. Wilkinson*, 1

Beav. 370; *Attorney-General v. Clarke*, *Ambl.* 422; *Attorney-General v. Bovill*, 1 *Phil.* 762.

The application made to this Court in 1844 shews, that the vestry considered this a *charity* property, for the proceedings were intituled, "In the Matter of the *Richmond Parish Charity Lands*."

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This is a charity for the benefit of the poor of the parish generally in the largest and most general sense, and the vestry must keep the income of this charity distinct from the ordinary rates provided for the relief of the poor. They cited *The Attorney-General v. The Corporation of Exeter (a)*.

Mr. R. Palmer and Mr. Selwyn, *contrà*. This is not the case of a voluntary gift of property, simply for the benefit of the poor, but an arrangement between the lord of a manor and commoners of the parish, sanctioned by the legislature, for the application of a portion of the waste to parish purposes, and for the benefit and relief of the contracting parties. The commons in question belonged to his late Majesty, as lord of the manor, and to the parishioners having commonable rights thereon; and the parish, requiring a new workhouse and cemetery, it was arranged, that they should be provided for out of the waste, and part of the consideration given by the parish was shutting up, for the convenience of the crown, the lane passing from *Kew* to *Richmond*. A workhouse having been provided, provision was then made for the employment of the poor therein, in the terms of the statute of *Elizabeth*. If the lands had remained in their original state, and had been employed by the parish officers, with the assent of the crown, as a rope-walk or garden or dairy land, the Attorney-General could not have interfered and prevented the lands or the profits being applied to parish purposes, nor could he have deprived the parish of the profits of the undertaking. If not, how can he interfere

(a) 2 Russ. 45 and 3 Russ. 395.

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mere because an arrangement between the own
 has been sanctioned by Parliament? This is an attes
 to bring parish property within the jurisdiction of
 Charity Commissioners, and to convert a private int
 public trust.

The preamble and every clause in the act tend
 way, and shew that it passed for the better enabling
 vestry, elected by the parish, to manage the paroch
 affairs. The old workhouse was an ordinary put
 poorhouse, the new one is substituted for it, and
 same may be said of the burial-ground. The act
 expressly directs, that the moneys to be received from
 profits of the work "shall go in aid of the poor rates
 (s. 52.), and all the moneys are to be paid into a comm
 fund, but if the Informant's contention be correct,
 vestry must keep the money, the accounts and the inco
 separate and apart from the parish moneys, accounts
 income, and they must be separately applied, a th
 altogether contrary to the meaning of the act and
 intention of the contracting parties, and, in truth
 thing perfectly impossible.

The other clauses, and the whole scope of the
 shew, that this is a parish act, and that the trusts
 strictly parochial. Thus the 40th clause vests the
 perty of every description in the workhouse in the vest
 exactly as in ordinary cases it is vested in the overse
 The 41st gives power to raise money for the purpo
 of the act by rates, and by the 42nd, the money
 borrowed is to be paid out of the rates; the 51st
 thorizes the employment of the poor, and the 52
 provides, that the money arising therefrom shall go
 aid of the poor rates." One common fund seems to
 provided to meet the parish wants.

The continued custom from the passing of the ac

the present time shews the meaning and true interpretation of the act.

Attorney-General v. Heelis (a); *Attorney-General v. The Corporation of Berwick-upon-Tweed* (b), and the Poor Law Statutes (c), were also cited.

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Mr. Terrell, in reply.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

Dec. 4.

This is an information filed *ex officio* by her Majesty's Attorney-General, in consequence of a certificate by the Charity Commissioners of 24th July, 1854, stating matters specially to the Attorney-General, and thereby suggesting to him the propriety of calling for the interference of this Court accordingly.

The Attorney-General, by his Information, prays a declaration, that the appropriation of the income of this charity is at variance with the proper objects of it, and with the Act of Parliament establishing it, and asks for a scheme for the future application of the income of the charity, for an injunction to restrain the future application of it as at present, and for an account of the rents of it.

The land was given, and the trusts on which it was to be held were declared by the statute of the 25th Geo. 3, c. 41. The contest is, whether these trusts are for the relief of the poor, in aid of the poor rates, and other parochial burdens of the parish of *Richmond*, in *Surrey*, or whether these trusts are for the poor, wholly independent of the rates and other parochial burdens and purposes. I think it material to observe, that in either event, the trusts are charitable, and that this Court will,

(a) 2 Sim. & St. 67.
(b) Tamlyn, 239.

(c) 3 Chitty's Stat. (Wel. & Beavan's edition), 634.

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when called upon, see that the income of the land was duly applied according to the charitable trusts, whether they are for the benefit of the parish, or whether they are for the benefit of the poor exclusively of the parish. I think it the more necessary to make this observation, because, in my opinion, notwithstanding the respect I naturally feel for the certificate of the Charity Commissioners, and the *ex officio* information of the Attorney-General filed in consequence of the Certificate, the whole proceeding is founded on a misapprehension, arising, in a great measure, from the want of a proper appreciation of the circumstances.

The whole question depends on the construction of the statute 25 *Geo. 3*, which I shall go through in detail; but, before doing so, I think it material to refer to the Act of 6 *Geo. 3*, in substitution for which the Act in question was passed. It relates exclusively to the purposes, with the exception of shutting up a highway. The Act of 25 *Geo. 3* repeals this statute, and is thus intitled:—[*The MASTER of the ROLL stated the effect of the various clauses of the Act, and of the 38th section and the 50th and 51st (a).*]

If any doubt could have arisen from the other provisions of the act, these two sections would, in my opinion, have been sufficient to determine what the character and nature of this charity was to be, and what the source were of the income to be derived from the land. The question is, were these trusts for the benefit of the poor (so to be received into the workhouse) separate and distinct from the parish, or were they to be for the benefit of the parish and in aid of its burdens? The former, and the poor to be admitted were to be admitted without any view to general parochial purposes.

(a) See *ante*, p. 238.

would have been treated in a manner wholly foreign to the whole scope and purpose of this act; they must, in that case have been treated somewhat in the character of almspeople; but how inconsistent with such an idea is the fact, that they are compellable to work by punishment, at the will of the vestrymen, and that the produce of their labour is to be taken from them and sold, and the money arising therefrom is not to be applied for their benefit, but to go in aid of the poor rates.

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The 62nd is that on which the information relies, it is to this effect:—[*His Honor read it (a).*] The words used, are “for the employment and support of the poor of the parish;” the question then arises, how are the poor to be employed and supported? The answer is, in the manner specified in the remaining sections of the act, viz. they are to be employed in compulsory work in the workhouse for the benefit of and in aid of the poor rates.

I shall, however, return to the consideration of these words when I have noticed the remaining sections of the act. [*His Honor next adverted to the remaining sections.*]

I declare that, after the most attentive perusal, I have been wholly unable to discover any thing that should make this gift other than a gift in trust for the benefit of the parish of *Richmond*, in the manner there specified.

Assuming it to be perfectly clear that a gift simply “for the employment and support of the poor of a parish” would not enable the produce or income arising from that gift to be employed in aid of the rate payers, that principle cannot regulate a case such as the present, where the gift itself proceeds to specify the particular employment and support, for the purpose of providing which the gift is made. Here the words “employment and

(a) See ante, p. 238.

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and support" are specified in the provisions of, and as explained by the nature and effect of the whole Act. Thus the title of the Act is, "For the Relief and Employment of the Poor of the Parish;" and the word "relief" appears to me, throughout this Act, to point to the same end as the word "support," although, unless received into the house, the poor would not be wholly supported by the parish.

The Act then specifies how persons are to be relieved and employed, that is, they are to be relieved by the levying of rates from the inhabitants able to pay them, which are to go into and form a common fund, with certain matters afterwards specified, and out of the fund so created a sufficient sum is to be applied for the support or relief of the poor who are incapable of supporting themselves.

This being the mode in which they are to be supported, how then are they to be employed? Why, they are to be employed by being compelled to work at the workhouse at the will of the vestrymen, who may, by punishment, enforce the performance of this work, and the produce of it is to be sold and the money applied "in aid of the poor's rates;" that is, the rates, the money arising from the sale of the produce and the labour of the poor in the workhouse, are, together with the penalties, to form the common parochial fund to be in the hands of the treasurer.

What limit is there imposed by this Act as to the mode in which the vestrymen might employ the poor in the workhouse? Might they not employ them in digging and planting the ground as a garden, as well as with the walls of the workhouse itself? If they might, still the produce of their labour was to go in aid of the poor rates, that is, the produce derived from the use of the
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land granted was to be so applied. It was suggested that it might have been used for a rope-walk, or for pasturing cattle. I see nothing in the Act to prevent it, and if so, the produce would clearly have gone to the purposes of the Act, viz. to the common parochial fund. In fact, this is, throughout, a mere parish Act, in some respects of an unusual character, but still a mere parish Act, to regulate the parish of *Richmond*.

It is no slight matter also, in a case of this description, that the conduct of the vestrymen and the application of the produce of the land seems to have been uniform from the passing of the Act till the present time, viz. for seventy years, during which time it has never for one moment been supposed by any one, till the Charity Commissioners gave this certificate, that the trusts for which this land was given, and the purposes for which the income of it were to be applied, were other than parochial trusts and parochial purposes.

It would seem to me (as I suggested at the commencement of my observations) as if this information had arisen out of a misapprehension of what is the meaning and extent of the word "charity" or "charitable trust," as applied to these cases; a misapprehension not confined to the Charity Commissioners, but participated in, if not by the vestrymen, at least by their vestry clerk. This is shewn by the communications on both sides, set forth in the information. Both parties seem to have thought, that if it could be proved that the land had been given for charity purposes, it could not be applied towards the relief of parochial burdens. Accordingly, great reliance seems to have been placed by the Charity Commissioners, on a fact, which is prominently put forward in the information, though (as indeed was to be expected from the Counsel engaged) not much in the argument, but which appears to me
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to be wholly immaterial. The fact is this:—that in *December*, 1844, an application was made, under the *52 Geo. 3, c. 101*, to this Court, to approve of a scheme for granting building leases of these charity lands, after which a scheme was approved and the property let on building leases accordingly.

It is the rule of this Court, that a long lease, such as would be required for building purposes, and which is a partial alienation of charity property, cannot be validly made without the sanction either of Parliament or of this Court. The Act which gave the land gave no such power, and therefore the vestrymen, who are the trustees of this charity, came to the Court of Chancery and obtained its sanction, for the purpose of enabling them to grant building leases. This application was regular and necessary; the mistake made is, in supposing that this application to Chancery could vary or affect the original trusts of the charity. That this land was charity land given in trust for public charitable purposes cannot be disputed, even assuming that my construction is correct, and that the trusts on which the land in question is given are to relieve the burdens of the parish of *Richmond*. If it had not been given by statute, it would have been within the Statute of Mortmain.

Money and, subject to the provisions of the Mortmain Act, land given for the benefit of a parish and in aid of their general parochial burdens is a perfectly good and valid charitable trust, and one which will be enforced by this Court, although for the benefit of rate-payers. In fact, the relief of public burdens, as the payment of fifteenths, of setting out soldiers, and of other taxes, is one of the branches of charity specified in the preamble of the Statute of *Elizabeth* (43 *Eliz.* c. 4). This misconception seems, as I have observed, to have extended
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to the Defendants, for the information states, that by the reply of the vestry clerk to the application of the Charity Commissioners he disputes the charitable nature of the trusts created by the provisions of the Act of Parliament, instead of being satisfied with saying that the trusts on which the land was given were duly and properly performed. I entertain no doubt but that the land is held on charitable trusts within the meaning of the Charitable Trusts Act, and that if the income of it were misapplied, as, for instance, if the income of it had been applied in the building of almshouses, and in the support therein, in idleness, of a few favoured almspeople, or for other purposes wholly foreign to the parish of *Richmond* and the trusts specified in the Act, that this Court would interfere at the instance of the Charity Commissioners. But my decision is, that on the evidence before me, the income does not appear to have been misapplied, but that it appears to have been applied in aid of the poor rates of the parish of *Richmond*, which, in my opinion, was the charitable trust for which this land was granted, and which is specified by the provisions of the statute in question, and that, if otherwise employed, this Court would, if called upon, interfere to prevent such employment.

I abstain from going into any question, whether the parish of *Richmond* was a purchaser, by the surrender of the rights of common given up by the parishioners when the grant was made. I think it only material to say, that this being a suit for the purpose of rectifying the mal-administration of this property, it appears to me to have been and to be administered according to the trusts on which it was given seventy years ago, and on which it has constantly since been administered.

The result is, that the information must be dismissed.

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Nov. 26.
Dec. 3.

Taxation ordered, at the instance of *cestuis que trust*, of a bill incurred in respect of a trust estate by trustees, both being now dead; but any balance due from the solicitor was ordered to be paid into Court, to a separate account and not to the Petitioners.

In re HALLETT.

IN 1817, upon the marriage of Mr. and Mrs. *Barnard*, some property had been settled on the usual trusts for themselves and their children.

Mr. *Hallett*, who had been employed as solicitor of the trust, had received part of the trust moneys, and had been the solicitor in a suit in which Mr. *Newman* and Mr. *Ainger* had been appointed new trustees, through his instrumentality.

Ainger died in 1848, and *Newman* was stated to have died in 1852, but the *cestuis que trust* alleged that they were totally unacquainted with *Newman*, and utterly ignorant where he died, or who were his legal personal representatives. They stated they had repeatedly applied to *Hallett* to afford them such information, with a view to obtain an order for the taxation of the trust bills of costs, and the delivery of the trust accounts, at the instance of the persons entitled, at law, to require the payment of what should be found due on the balance of the accounts and the taxation of the bills of costs, and if necessary to obtain the appointment of new trustees for that purpose, but that *Hallett* refused to afford them any such information.

The parents and children (the *cestuis que trust* under the settlement) presented a petition for the taxation of the trust bills of costs, under the 6 & 7 *Vict. c. 73*, s. 39, authorizing taxation at the instance of the party chargeable. These bills of costs were mixed up with other bills against Mr. *Barnard* personally. The petition prayed, as usual, the payment of the balance

balance of the trust funds by the solicitor to the Petitioners. The question was as to the right to taxation, and, incidentally, a question arose, as to what was to be done, in case anything should, under the usual order, be found due from the solicitor to the trust.

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Mr. R. Palmer and *Mr. V. C. Knight*, in support of the petition.

Mr. Roupell, contra.

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It is clear, that an order for taxation must be made, subject to the question of costs, as to which I will read the affidavits.

It is admitted by *Mr. Palmer*, that I cannot order the money found due from the solicitor to be paid to the Petitioners, for if it were paid over, that would be no indemnity to the solicitor against any breach of trust.

If any balance should appear to be due from the solicitor, in respect of the trust estate, I must direct it to be paid into Court, to an account to be intituled "The Trusts of the Marriage Settlement of Mr. and Mrs. Barnard." I will afterwards state what I will do as to costs.

The MASTER of the ROLLS said that he was not satisfied as to the conduct of either party, and though he had somewhat waived in opinion on the matter, he had ultimately come to the conclusion, after taking into consideration the conflict of the evidence, that the proper course would be to give no costs to either side of the petition.

Dec. 3.

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VIVIAN v. MORTLOCK.

Dec. 11, 12.

Construction
of the word
"residue."

A *feme covert* had power, by will, to appoint a trust fund, of which 2,000*l.* was payable immediately, and the remainder subject to her husband's life interest therein. She appointed the 2000*l.*, and directed the trustees, after the decease of the husband, to stand possessed of the "residue" of the stock, after payment thereof of the 2,000*l.*, upon trust to pay 5,700*l.* as the husband should appoint, and to apply the residue in payment of a number of legacies. The husband appointed the 5,700*l.* to himself. Held, notwithstanding there was a

BY the marriage settlement of the Plaintiff and his wife, divers sums of stock were vested in trustees, upon trust to pay the income to the wife during their joint lives, and to the survivor for his or her life, and from and after the decease of the Plaintiff, and in case there should be no issue and the wife should predecease him, upon trust to pay the capital stock to such persons as the wife should by will appoint, and as to 2,000*l.*, to be raised thereout, upon trust to pay the same in the Plaintiff's lifetime, notwithstanding his life interest, to such persons as the wife should by will appoint.

There was no issue of the marriage. The wife predeceased the Plaintiff, and by her will appointed the 2,000*l.* to be paid immediately after her decease, and she directed the trustees, from and immediately after the death of the Plaintiff, to stand possessed of the *residue* of the trust fund, after payment thereof of the 2,000*l.*, upon trust to raise and pay the sum of 5,700*l.* to such persons as the Plaintiff should by deed or will appoint, and to pay over to certain persons all the *residue* of the trust fund, to be applied in payment of certain legacies, partly charitable. And the testatrix declared, that in case the trust funds thereby appointed should be insufficient for the payment of all the legacies given by the will, the deficiency should, in the first place, be made good

probability that the fund would prove insufficient for the payment of all the legacies, that he was entitled to immediate payment of the 5,700*l.* The "residue" applicable to the payment of the legacies (other than the 5,700*l.*) being held to mean simply what remained after payment of the 5,700*l.*, and not a proportionate share of the fund.

good out of the charity legacies which should accordingly abate.

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The charity legacies amounted to 3,000*l.* and the other legacies to 31,700*l.*, and the trust funds, at the then price of stock, would produce about 33,700*l.*, leaving a margin of only about 2,000*l.* over the ordinary legacies, and, by a fall in the price of the stock, it might, at the death of the Plaintiff, be insufficient to pay the ordinary legacies in full.

On the death of the wife, the trustees paid the 2,000*l.*, but they refused to pay the 5,700*l.* to the Plaintiff, who by deed had appointed that sum to himself, on the ground that, although in case of a deficiency, the charity legacies were to abate first, still there might, at the death of the Plaintiff, be a deficiency, to be borne in part by the 5,700*l.* legacy, and if that should so happen, they, the trustees, would have to bear the loss, in case they now paid that legacy in full.

The Plaintiff, however, being entitled both to the income and the principal, claimed immediate payment of the 5,700*l.*

Mr. Roupell and Mr. Shapter, for the Plaintiff, contended that the word "residue" was to be taken in its proper and correct sense, as meaning what remains of a fund after the withdrawal of a part, and not as meaning a definite share of it; *Carter v. Taggart* (a); *Falkner v. Butler* (b); that the Plaintiff, being entitled to the capital of 5,700*l.* and to the intermediate income of it, was entitled to the immediate payment of that sum; *Barford v. Street* (c); *Irwin v. Farrer* (d); *M'Queen v. Farquhar* (e); *Firmin v. Pulham* (f); that persons entitled

(a) 16 *Sim.* 423.(b) *Amb.* 514.(c) 16 *Ves.* 135.(d) 19 *Ves.* 86.(e) 11 *Ves.* 467.(f) 2 *De G. & Sm.* 99.

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entitled to a future payment of capital have a right to have the fund appropriated for that purpose, and if they are entitled to all the intermediate income also, they have a right to immediate payment; *Green v. Pigot* (a); and that the Court does not speculate on the price of stocks; *Gillibrand v. Goold* (b).

Mr. *Lloyd* and Mr. *Baggallay*, for the executors of the wife. The residue in this case means a definite share; *Page v. Leapingwell* (c). There can be no union of the interest or the income and the capital of the 5,700*l.* to defeat the intent of the testatrix, who meant that her husband's appointee should not enjoy the capital until after his death, and that the fund should be distributed, according to the value of the stock, at his death. The doctrine as to appropriation and payment is useful in administration suits, in order to provide for the legacies and ascertain the residue, but it has no application to this case.

Mr. *R. Palmer* and Mr. *Piggott*, for the trustees of the settlement.

The MASTER of the ROLLS ordered the 5,700*l.* to be raised and paid to the Plaintiff immediately, and the costs to be paid out of the residue. The rest of the funds to be transferred into Court, and the income to be paid to the Plaintiff for life or until further order.

(a) 1 Bro. C. C. 103; 1 Rop. v. *Strangways*, 14 Beav. 139; Leg. 793 (3rd ed.).
 (b) 5 Sim. 156. Petre v. *Petre*, Ib. 197; Hewitt v. *George*, 18 Beav. 522.
 (c) 18 Ves. 463; and see *Read*

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TENNANT v. HEATHFIELD.

Dec. 11, 12.

THE testator gave one-third of his residuary personal estate in trust for the separate use of his daughter *Sarah*, the wife of the Rev. *Robert Style*, for life, and after her decease, in trust for her children, as she should appoint, and in default of appointment, in trust for the children in equal shares as follows:—"to be paid, transferred or assigned to such child or children in manner following (that is to say), to a son or sons at his or their age or ages of twenty-one years respectively, or to be sooner advanced or paid for or towards his or their preferment or advancement in the world respectively, at the discretion of my trustees, and to a daughter or daughters at her or their age or ages of twenty-one years or day or days of marriage respectively, which shall first happen. Provided always, and I do hereby declare my will to be, that in case such child or any of such children, being a son or sons shall attain his, her or their age or ages of twenty-one, or being a daughter or daughters shall attain such age or be married in the lifetime of their mother, the other shares of such child or children respectively of or in the trust moneys, and as well by survivorship or otherwise, shall from thenceforth, be considered as *vested* in such child or children respectively, and be transmissible, but shall not be paid till after the death of his or their mother respectively. Provided also, and I do hereby likewise declare, that in default of such direction or appointment as aforesaid, and in case such child or all or any of such children of my daughter *Sarah* shall happen to die before his, her or their share or shares respectively of

As a general rule, when a bequest is to take effect after the failure of a prior gift, the total failure of the latter does not prevent the ulterior bequest taking effect.

Distinction between a series of limitations all dependent on the same contingency, and successive limitations, each intended to take effect upon the failure of all those prior to to it.

Gift to *A.* for life, and after her decease to her children, and in case of their death before the vesting of their shares, in trust for her next of kin. The daughter never had any children. Held that her next of kin were nevertheless entitled.

or

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or in the said trust moneys shall become vested a-
 aforesaid, my said trustees, &c., "shall stand possessed
 or interested in the trust moneys so given to them, in
 trust for my daughter *Sarah* as aforesaid, or so much
 thereof as with respect to a son or sons shall not have
 been sooner advanced or paid, or as to which no such
 direction or appointment shall be made as aforesaid, in
 trust for the next of kin of my daughter *Sarah* at the
 time of her decease, according to the Statute of Distri-
 bution of Intestates' Personal Estates, exclusive of her
 said present or any future husband.

Sarah Style died in *February*, 1855, without ever
 having had any child. She left the Plaintiffs her sole
 next of kin, who claimed the trust fund, and they filed
 their bill to compel a transfer.

To this bill the Defendants, the trustees, filed a de-
 murrer.

Mr. *Roupell* and Mr. *Rawlinson*, in support of the
 demurrer. The next of kin of *Sarah Style* take no inter-
 est in the fund, which belongs to the next of kin of the
 testator. The gift to the next of kin is dependent on the
 previous gift taking effect and afterwards failing, and as
 the prior gift never took effect, the ulterior gift never had
 any operation. The condition is to be construed strictly,
 and therefore the gift to the next of kin of *Sarah Style*
 did not take effect, inasmuch as they could not take
 through the prior limitation. In *Underwood v. Wing* (a),
 it was contended, that there was a series of limitations,
 and that if the previous limitations failed to take effect
 the fund was to go to *Wing*, that it was in fact not a
 gift upon condition, but one of a series of limitations,
 but

(a) 4 *De G., M. & G.* 633, affirming 19 *Beav.* 459.

but the argument failed. They referred to *Jones v. Westcomb* (a); *Doe d. Watson v. Shipphard* (b), which was a demise of lands to the testator's daughter, if she survived her husband, for life, and after her death to certain uses; the daughter died before the husband; and it was held, that the limitations over did not take effect; and to *Andree v. Ward* (c), where the strict construction was adopted; and *Lee v. Busk* (d), and *Ex parte Rogers* (e), where the same principle prevailed.

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Mr. R. Palmer and Mr. Selwyn, *contra*, were not heard.

The MASTER of the ROLLS said, he entertained a strong opinion that the next of kin of the daughter were entitled to the fund, but he reserved judgment.

The MASTER of the ROLLS.

Dec. 12.

I have looked at this case attentively, and have considered the argument, but I am confirmed in the view which I took of the case yesterday. The question is, whether the gift over to the daughter's next of kin took effect, and I am of opinion, that it does. I think it may be stated, as a general rule, that when a bequest is to take effect after the failure of a prior gift, the total failure of that gift does not prevent the ulterior bequest taking effect. The case of *Jones v. Westcomb* (f) was a very strong case; but neither that case nor the cases of *Andree v. Ward* (c), and *Doe d. Watson v. Shipphard*

(a) *Prec. Ch.* 316.

(b) 1 *Dougl.* 75.

(c) 1 *Russ.* 260.

(d) 14 *Beav.* 459 and 2 *De G.*,

M. & G. 810.

(e) 2 *Madd.* 449.

(f) *Prec. Ch.* 316 and 1 *Eq. Ca. Ab.* 245, pl. 10.

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 TENNANT to apply to this case. In the latter case, the question  
 v. was, whether you could imply an estate; that is not the  
 HEATHFIELD. case here.

*Underwood v. Wing* (b) no doubt might seem to have a bearing on this case, but, in my opinion, it has not, and it is perfectly distinct. I adhere to the decision I came to in that case, which is perfectly distinguishable from the present. In *Underwood v. Wing*, the testator, Mr. *Underwood*, gave the whole of his property to his wife, and in case she died in his lifetime, then to his children; and on failure of the gift to the children, he gave the property to Mr. *Wing*. All those gifts, no doubt, failed, but they failed for this reason:—because it was not proved that the wife died in the testator's lifetime, and consequently it was not proved that the event had occurred on which the gift was to take place. In that case, the whole series of limitations depended on a contingency, which was not proved to have happened. That case was different from the present, where each limitation is to take effect on the failure of those preceding it.

I am of opinion, in this case, that the plain intention of the testator was, that his daughter should take an estate for life, and on her death, if she had no children who took a vested interest, the property should go to her next of kin: and that on the authority of *Jones v. Westcomb*, and several other cases, I must hold, that the next of kin of the daughter, at her death, took the fund, and that there was no intestacy.

(a) 1 *Doug.* 75.

(b) 19 *Beav.* 459 and 4 *De G., M. & G.* 633.

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HARTOPP v. HARTOPP.

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Jan. 15.

**T**HIS was a bill filed to set aside a resettlement of family estates, made between the Plaintiff *John W. C. Hartopp* and his father *Sir William E. C. Hartopp*, Baronet (the principal Defendant), on the grounds, that it was harsh and unreasonable as regarded the Plaintiff and unduly favourable to *Sir William*; that the Plaintiff did not fully understand the nature of the transaction, and had no separate adviser; that he acted under the parental influence of *Sir William*, and that the settlement did not carry into effect the proposals agreed to between the parties.

Parental influence is inseparable from arrangements between father and son for the resettlement of family estates; but its existence and operation are not sufficient to invalidate the transaction, if it be not exerted for the benefit of the person possessing it.

The circumstances under which the resettlement was executed were as follows:—On the death, in April, 1849, of *Sir Edmund C. Hartopp*, who was the survivor of the two elder brothers of *Sir William*, the

Transactions between parent and child are to be regarded with jealousy, but, in arrangements between father and son

for the resettlement of family estates, if the resettlement be not obtained by misrepresentation or suppression of the truth, if the father acquires no personal benefit, and if the settlement is a reasonable one, the Court will support it, even though the father did exert parental authority and influence over the son to procure the execution of it.

The Plaintiff was tenant in tail, and the Defendant, his father, tenant for life of family estates. The Plaintiff, eleven months after attaining twenty-one, being in pecuniary difficulties, joined his father in a resettlement of the estates. The Court, though satisfied that parental authority and influence had been exerted to obtain the execution of the settlement, but not for the father's individual advantage, who obtained no direct personal benefit from it, supported the settlement, holding that a jointure thereby provided for the son's mother did not come within the definition of benefit to the father, and that the postponement of the son's daughters to his younger brother was not unreasonable, considering that thereby the estates were made to accompany the family title.

If one party be acting under a misapprehension, and the other is accessory to it, although unintentionally, the transaction cannot stand.

Upon a bill to set aside a deed *in toto*, the Court will not reform it.

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latter became entitled, by virtue of certain family settlements of 1777 and the will of Sir *Edmund*, to the family estates, as tenant for life, with remainder to the Plaintiff, his eldest son, in tail male, with remainder to Sir *Edmund* in fee, but subject, as to part, to a charge of 10,000*l.* for the portions of the daughters and younger sons of Sir *William's* father, and a term of 500 years for raising it. Sir *William* was also seised in his own right of certain real estate in fee simple.

On the 21st of *October*, 1850, the Plaintiff attained his age of twenty-one years. He had, during his minority, incurred debts, and in *April*, 1850, had applied to Mr. *Roger Miles*, the family solicitor, or to his brother *Thomas Miles*, the agent and land steward of Sir *William* (which of the two did not on the evidence clearly appear), for a loan, stating the object for which he required it. The solicitor suggested the propriety of resettling the family estates, and the suggestion was acceded to by the father and son, it being understood, though not expressed in words, that the resettlement was the condition on which the Plaintiff was to be relieved from his difficulties. Proposals for a resettlement were accordingly drawn up by the solicitor, which were assented to by the Plaintiff, and which, with certain variations, were embodied in a series of deeds which were executed by the father and son. Of these the material one bore date the 16th *September*, 1851, and this the bill sought to set aside.

By this deed, the family estates (subject to the 10,000*l.*, and the 500 years' term to raise the same) were re-settled to the use of trustees for a term of 600 years, upon the trusts thereafter expressed, and subject thereto to such uses as the Plaintiff and Sir *William* during their joint lives should appoint, and, in default—

default of appointment and subject thereto, to the use that the Plaintiff should, during the joint lives of himself and Sir William, receive an annuity of 400*l*, which, however, was to cease and be void in case of alienation by the Plaintiff, in any manner, whether directly or by operation of law; and, subject thereto, to the use of Sir William for life, and after his decease to the use that his wife, the Defendant Lady Hartopp, should receive an annuity of 400*l*. for life; remainder to the use of the Plaintiff for life, remainder to the use of trustees for a term, upon trust to raise portions for the Plaintiff's younger children to the extent of 6,000*l*. if but one child, and of 10,000*l*. if more than one; remainder to the use of the first and other sons of the Plaintiff successively in tail male; remainder to the use of the Defendant Edmund Charles Hartopp, the second son of Sir William, for life; remainder to his first and other sons successively, in tail male; remainder to the use of the third and every other younger son of Sir William thereafter to be born successively, in tail male; remainder to the use of the first and every other daughter of the Plaintiff successively, in tail male; remainder to the use of the first and every other daughter of Edmund C. Hartopp successively, in tail male; remainder to the use of the first and every other daughter of Sir William then or thereafter to be born successively, in tail male; remainder to such uses as the Plaintiff should after the decease of Sir William, but not before, by deed or will appoint, and in default of appointment, to such uses as Sir William and Edmund C. Hartopp should at any time after the decease of the Plaintiff, but not before, by deed jointly appoint, and in default of such appointment, to the use of Sir William, his heirs and assigns. The trusts of the 600 years' term were declared to be, to raise a sum not exceeding 2,000*l*. for payment of the Plaintiff's debts, and a sum not exceeding 4,000*l*. for purchasing

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purchasing a commission in the army; and the Plaintiff was thereby empowered to grant a jointure to his wife not exceeding 800*l.* a year, of which 400*l.* a year only was to be payable during the life of Sir *William*, if he should survive the Plaintiff. The deed contained a provision for taking the name of *Hartopp*, by the husband of daughters, and powers of leasing, sale and exchange and partition.

In 1847, part of the settled estates had been purchased by the *Midland* Railway Company for 6,675*l.* and in *December*, 1851, after the Plaintiff came of age the purchase was completed, and the piece of land was duly appointed by the Plaintiff and Sir *William* to the company. This money, being subject to be invested in land, Sir *William* conveyed lands adjacent to the settled estates of which he was owner in fee, of an estimated value of 7,331*l.*, upon the trusts of the settlement, and he received the 6,675*l.* for his own use. He then advanced, out of the 6,675*l.*, 2,000*l.* to pay Plaintiff's debts, and 2,000*l.* for a commission, and took an assignment of the 600 years' term to a trustee to secure the advance.

The solicitor had since died, and the original proposals as agreed to by the Plaintiff and Sir *William*, had been lost; but the Court thought, upon the evidence, that the variations from them in the resettlement were not very material. The provision as to the 4,000*l.* to buy a commission was struck out in the proposals as agreed to but was introduced into the resettlement without the knowledge either of the Plaintiff or Sir *William*, probably by the solicitor. The reason might have been, that at the time the proposals were agreed to, the Plaintiff had lost all hope of obtaining a commission, but soon after he was offered one. Again, though the proposals stated

stated that the Plaintiff's annuity was not to be anticipated, they did not add, that any attempt to do so would be a forfeiture.

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Under these circumstances, the Plaintiff filed his bill to set aside the resettlement.

The Solicitor-General (Sir *R. Bethell*), Mr. *Roupell* and Mr. *Rudall*, for the Plaintiff, cited *Hoghton v. Hoghton* (a); *Tweddell v. Tweddell* (b); *Gordon v. Gordon* (c).

Mr. *R. Palmer* and Mr. *J. Pearson*, for Sir *William Hartopp*, cited *Baker v. Bradley* (d); *Stockley v. Stockley* (e); *Winnington v. Foley* (f).

Mr. *Rolt*, Mr. *Selwyn* and Mr. *Bell*, for the other Defendants.

The Solicitor-General in reply.

The MASTER of the ROLLS reserved judgment.

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This case is one which, when the facts are fully understood, presents no difficulty to embarrass the decision of the Court.

Jan. 15.

The

(a) 15 *Beav.* 278.  
(b) *Turn. & R.* 13.  
(c) 3 *Sweenst.* 400.

(d) 25 *L. J. (N. S.) Ch.* 7.  
(e) 1 *Ves. & B.* 23.  
(f) 1 *P. Wms.* 535.



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The history of the case is very shortly told. The Plaintiff is the eldest son of Sir *William Hartopp*, the Defendant, who succeeded to the baronetcy on the death of his brother in *April*, 1849, when the Plaintiff was nineteen and a half years old. The Plaintiff had no regular allowance, he was bred for the army, he knew himself to be the heir to the baronetcy, to which a considerable estate was attached, the reversion of which, subject to his father's life estate, was settled on himself, as tenant in tail as to part, and as tenant for life as to the remainder. He ran into considerable expenses, he dreaded communicating them to his father, and raised money by bills to a considerable amount. All this occurred while he was a minor. About six months before attaining his majority, he applied either to his father's confidential solicitor, or to his confidential steward and land agent, who were brothers, to obtain for him the loan of a sum of money. There is some contest on the evidence as to which it was, but this is not material. The solicitor suggested the propriety of resettling the family estates; this was acceded to by father and son, and, although it was not expressed in words, the resettlement seems to have been the understood condition in consideration of which the son was to be relieved from his difficulties. Accordingly proposals for a settlement were drawn up, which, subject to considerable variations, were incorporated in a deed, or series of deeds of the 15th, 16th, 17th and 18th *September*, 1851, which were executed both by the father and son.

The material deed was that bearing date the 16th *September*, 1851. This the son now seeks to set aside, and files this bill for that purpose. The grounds on which he proceeds are, 1st, that the provisions of the settlement are harsh and unreasonable in themselves against the Plaintiff, and favourable to the Defendant;  
 secondly,

secondly, that the Plaintiff did not, in fact, fully understand the nature and effect of the transaction, and had no separate professional adviser to explain the matter to him; thirdly, that he was subject to undue influence, that he was acting in accordance to the wishes of his father, and subject to heavy pecuniary embarrassment at the time; and, besides these, a fourth ground relied upon and urged is, that even if all the former grounds fail, the deeds, as executed, do not carry into effect the views and proposals agreed upon between the parties; that the settlement, in truth, is neither that of the father nor of the son, but that it is the settlement of the confidential steward, who did what he thought best for all parties concerned, but did not, in truth, consult them sufficiently, or carry their wishes into effect.

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I do not think that the law on this subject is open to very much question.

I fully concur in the observations of Lord *Eldon*, in *Tweddell v. Tweddell* (a), that these cases between parent and child are to be regarded with jealousy, and I also concur in the statement made by myself in *Hoghton v. Hoghton*, as the result of the cases in this subdivision of the subject, which relates to instruments executed between persons standing in intimate relation to each other effecting a resettlement of family property:—that if the settlement be not obtained by misrepresentation or suppression of the truth, if it be one in which the father acquires no benefit, and the settlement be a reasonable one, the Court will support it, even though the father did exert parental authority and influence over the son to procure his execution of it.

I proceed

(a) *Turn. & Russ.* 13.

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I proceed to examine the grounds on which the transaction in question is impeached. In the first place, I do not doubt, that the parental authority and influence of the father were exerted to obtain the execution of these instruments from the Plaintiff, or rather to obtain the son's acquiescence in the transaction. The evidence given by the father and Lady *Hartopp*, that no such influence was exerted, I treat simply in this light:—namely, that the parental influence was not openly and distinctly enforced, and which is undoubtedly true. But where this becomes necessary, the parental influence has lost much of its force; it is the silent influence that is the most efficacious; the knowledge which the son possesses of what would be the consequence if he refused to comply with his father's wishes, will, in the great majority of cases, have far greater effect upon him than the actual and open exertion of the parental authority, whether by commands or entreaties; this will not be openly exerted, until the son has, by his determination to resist them, rendered recourse to them necessary. In truth, I believe, that the exercise of parental influence is inseparable from these transactions, and that the son is always more or less influenced by the father, even though the father should endeavour, as much as possible, to avoid the exertion of his influence. In this case, I cannot doubt but that the son, although nothing was said on the subject, believed, that unless he acquiesced in the resettlement, he might in vain attempt to obtain from his father any pecuniary assistance towards the discharge of his debts. I have, however, already observed, that I do not consider the existence and operation of this influence sufficient to invalidate the transaction, if it be not exerted for the benefit of the person possessing it.

Now, in the present transaction, I find no direct  
 pecuniary

pecuniary benefit obtained by Sir *William Hartopp*; his estate and interest in the family property remain the same, except that his income is diminished by the amount of the charges upon it in favour of the Plaintiff or his widow. It is urged, that the provision in favour of the Plaintiff ought to be treated lightly, because the father would not, in any event, have left his son destitute, unless he had found that it was impossible to prevent him from ruining himself, which calamity is occasionally so unavoidably the result of acquiring early habits of expense and dissipation, that no exertions or fortune could avert it. Some weight is, doubtless, due to this argument, but the fact still remains, that this transaction reduces the father's income: it gives the son a legal claim for what before was but parental bounty; the sum raised for the payment of the son's debts, and for his advancement in life by the purchase of a commission, whether by a charge on the estate or by a sale of the father's property, further reduces his income to the extent of the interest properly attributable to that sum. All this shews, that at least the father obtained no pecuniary benefit by this transaction, but that, on the contrary, as far as it went, it was a direct diminution of his income. The indirect benefits which the father is alleged to have derived from the transaction are, the jointure for his wife, (the mother of the Plaintiff,) and the possible provision for the brother and sisters of the Plaintiff, and the substitution of his fee simple land for the money derived from the sale to the Railway Company of the settled land. The two former do not, in my opinion, come within the definition of benefits to the father, they are only to be regarded by the Court as a part of the provisions of the settlement, the propriety of which the Court will have to examine, when the nature and character of the arrangement itself is considered.

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The exchange of the fee simple land for that sold the Railway Company appears to me to be much more important; and if it had appeared, that any benefit had been derived by Sir *William Hartopp* by this transaction, not participated in by the Plaintiff, it would probably, at least in my mind, have given a very different character and aspect to the whole transaction. But the evidence convinces me, that the price paid for the land sold was a fair and reasonable price, regard being had to the situation of it, with reference to the settled property, and that the purchase of it was beneficial and desirable for the owner of the settled property.

These facts once established, as I consider them to be, it follows, that it was obviously an equal advantage to both father and son that the 4,000*l.* should be so raised, rather than by a mortgage of the settled property itself, which would besides have occasioned delay and expense, from the necessity of investigating the title to the settled estate before a mortgagee could have been found to advance his money on the security of it. This, therefore, was, in my opinion, a settlement, by which the father obtained no benefit, and the influence he possessed was not exerted for his own individual advantage.

I next proceed to consider the provisions of the settlement itself. On this head, although I have listened attentively to a very elaborate argument on the contents of the settlement, I am unable to concur in the opinion that the provisions are such, that the deed ought not to be allowed to stand. This question must be looked at, apart from the argument, that the deed did not carry into effect the proposals agreed upon between Sir *William Hartopp* and his son, and which point I shall have to consider separately. But, upon the assumption

sumption that the deed accurately represents the intention of the parties to it at the time of the execution, and considering the propriety of the provisions by themselves, I am unable to discover the impropriety of the provisions insisted upon. In fact, there is nothing in the deed which has been observed upon beyond this:—that it gives a jointure to the mother of the Plaintiff, and that it postpones the daughter of the Plaintiff to his brothers, the second and other sons of Sir *William Hartopp*. I consider the provision in favour of the mother of the Plaintiff proper to have been introduced into the settlement, when it is observed, that, from the circumstance of the descent of the baronetcy from the two elder brothers after Sir *William Hartopp's* marriage, the introduction of such provision had not been possible when the marriage took place, and that no other jointure or provision for the lady seems to have existed, in case of her surviving her husband. No one, in my opinion, can say, with propriety, that a son who is to enjoy an estate of 6,000*l.* or 7,000*l.* per annum, and who provides that his mother shall have 400*l.* per annum out of it, does that which, in any sense of the word, legal or moral, is either unfit or improper, and the evidence satisfies me, that this is the last subject of complaint which the Plaintiff personally would urge against the validity of the settlement. The provision for the brothers, before the daughter of the Plaintiff, does not appear to me to be unfit, having regard to the circumstance that the estate is thereby limited to accompany the title.

That the settlement might, with propriety, have provided more liberally for the Plaintiff and his issue, in the event of his marriage, than by giving a jointure of 400*l.* per annum to his wife, and raising 6,000*l.* or 10,000*l.* for his younger children, and above all by making

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making no increase to his own allowance during father's lifetime, is a remark which, if well founded, which I mean to express no opinion beyond saying the jointure to the son's wife is the same as that to his mother), cannot, in my opinion, invalidate the settlement, if, on the other points, no grounds exist for setting it aside.

It follows, therefore, if the tests by which these actions are to be tried, and which I have already referred to, be correct, and if they are applied to the present transaction, it must stand, unless it appears that it was obtained by misrepresentation or concealment. "There must be," says Lord Eldon, "a full consideration of all material circumstances; the party be acting under a misapprehension and the other party is accessory to it, although unintentionally. A transaction cannot stand."

In considering this point, it is necessary again to distinguish it from the consideration of the argument also raised in this case, viz. whether the deed in question accurately represents the intention of both parties, which is a separate matter, which I shall have to consider apart. What I have to consider here is, whether the Plaintiff was induced to execute this deed by the existence of some misapprehension, created by some inaccurate statement having been made to him, or by reason of some material fact having been omitted to be communicated to him. Upon a full consideration of the evidence in this case, I am unable to discover any ground of this kind. Even apart from the evidence of *Thomas Mills*, I am unable to lay my finger on any statement made to the son not consistent with truth, or any fact omitted to be communicated to

so material as to be likely to have influenced his wish to execute the settlement.

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The only fact which can be pointed out of this nature is, that, although the proposals stated that the annuity of 400*l.* was not to be anticipated, it did not explain to him that an attempt to do so would create its forfeiture. This matter I have very seriously considered. It is undoubtedly true, that to an unprofessional person, it might not be obvious, that the only mode of enforcing this provision would be by a clause of forfeiture, but I am of opinion that I cannot set aside the transaction on this ground. The Plaintiff had the proposals in his possession for several days, he fully considered them, he asked questions, and received explanations respecting them, and was informed, that all further information he required should be afforded him. I cannot, because he asked for no explanation as to the mode by which the prohibition against anticipation was to be enforced, infer, both that he was wholly ignorant of that matter, and next, that if he had known it, he would have refused his consent to the arrangement. All the other material things he fully understood; he understood fully that 4,000*l.* was to be raised to pay for his debts and for his advancement in life, and that the family estate, of which he was tenant in tail in remainder, was to be resettled, by giving him a life estate, by giving his mother a jointure of 400*l.* per annum, by providing a like jointure for his own widow, and by providing for his younger children, in case he should leave any, and subject to his making the estate go with the title.

On the question, therefore, whether the Plaintiff was bound by the terms of the proposals agreed upon, and whether a deed carrying these proposals into effect could

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could be set aside, I am of opinion, that according to all the principles by which these transactions are governed in this Court, such a result is impossible.

I have now to consider the variations which exist between the deed, as actually executed, and the proposals themselves, and how far the parties were cognizant thereof. I have already observed, that I consider the mode by which the railway money was taken, to furnish the 4,000*l.* instead of raising that sum by mortgage of the settled estates, was beneficial to both parties; but the evidence of Lady *Hartopp* convinces me, that the Plaintiff was aware of and assented to this part of the transaction.

The only remaining point which arises on the variation between the deed and the proposals, and which I have now to consider, is that which I have stated at the outset, as one of the grounds adduced by the Plaintiff for invalidating the transaction, viz. the assertion that the other variations between the deed, as executed, and the proposals agreed upon by Sir *William Hartopp* and his son, were not only not sanctioned by them, but that, in fact, the settlement, as executed, was not the settlement which either had agreed upon and wished to have executed.

If it was material, for the purpose of the suit in its present frame, I might, on this part of the case, have felt more difficulty than I have on the other parts of it. The evidence is loose, and in some places irreconcilable, and large gaps exist in the history of the transaction, which are not sufficiently explained.

The evidence of Mr. *Mander* is certainly, when strictly examined, open to the observation, that all the

arts of it cannot be entirely reconciled with each other. By whose direction that gentleman framed the settlement, so that the future purchase of the steps of promotion in the army were made to depend on the will and pleasure of Sir *William Hartopp*, does not appear, or whether, in fact, any directions to that effect were given at all. Unfortunately, the original instructions laid before Mr. *Mander* are lost, and it is scarcely possible, taking into consideration the multiplicity of such documents, which must from time to time have been laid before that gentleman in similar cases, that his memory, as to the minute details of such a document, not seen by him for four years before he gave his testimony, can be confidently relied upon. It seems probable also, that Mr. *Thomas Miles*, the confidential steward of Sir *William Hartopp*, was the only person who accurately knew what the deed contained, when it was brought for execution, and he confessedly gave no explanation at that time, either to Sir *William* or to the Plaintiff, of the contents, and they both seem to have been willing to trust to his statement, that the deed carried their intentions into effect.

But I abstain from going fully into the evidence on this subject, because I am convinced, that no grounds can be found, arising from these variations, to set aside the deed *in toto*, and that, if anything can be deduced from it, it is this and this only:—that a case might possibly be made to rectify the settlement, and make it, in these respects, in accordance with the original proposals agreed to by Sir *William* and the Plaintiff. But this is not the province of the present suit.

If the inference from the evidence drawn by the Plaintiff's Counsel and their arguments on this point are correct, the settlement does not, in all the minute details,

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carry into effect the intentions of either the Plaintiff or his father, but this is not a ground for setting it aside, but for rectifying it and making it conformable with their intentions; but which, if it can be done at all, can only be done in another and differently framed suit, and one which, if the parties are well advised and reasonable, will never be instituted.

The result is, that, in my opinion, the Plaintiff's case wholly fails, and that his bill must be dismissed. I only remains for me to dispose of the costs of the suit. I have regretted much to observe, on the perusal of the pleadings and evidence, that a stronger desire to cause personal aspersion existed in this case than I should have expected, notwithstanding the animosity which is usually found to prevail in cases where persons nearly related are so unhappy as to engage in contests before a Court of justice. I shall do nothing to aggravate these feelings, but I think it but due to the parties to say, that, upon a careful and dispassionate consideration of the contents of the whole of the papers before me, I see no ground for supporting any aspersions affecting the personal credit or honor of any person engaged in the transaction, either before the suit or for the conduct pursued by them in the suit. I have not taken the view of the case which the Plaintiff has pressed upon me, but I entertain no doubt that he gave his evidence with the intention of speaking the exact truth with regard to every point, and under the conviction that he was doing so, and I am of opinion, that I shall best consult the interest of justice by dismissing his bill without costs.

NOTE.—See *Wright v. Vanderplank*, *Lords Justices*, 8 March, 1856, and *Savery v. King*, *House of Lords*, 9 May, 1856.

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Re INGLE.

THIS was a motion by a solicitor to discharge the common order for taxation.

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A client obtained an order of course for the taxation of his solicitor's bill. A special agreement existed between them, which ought to have been mentioned on the application; but this was in the possession of the solicitor, who refused to furnish a copy. The Court declined to discharge the order, though irregular.

In 1849, *Thomas Nadin* employed *Thomas Ingle* to act as his solicitor in a suit of *Marshall v. Nadin*, instituted against him with reference to a number of shares in a railway company, of which, in 1837, he had become the purchaser and registered owner. In pursuance of an order made in the cause the certificates of those shares were deposited in Court.

Agreement between a solicitor and his client, an illiterate person, for payment of his bills (taken at a given amount), solely out of the produce of some property, the subject of the suit. Held, not to preclude taxation.

In 1851, *Nadin* died, and *Sarah Nadin*, his widow, took out administration to his estate. In *December*, 1852, *Ingle* delivered two bills of costs to *Mrs. Nadin*, amounting to 299*l.* 8*s.* 8*d.* In 1853, *Ingle* died, and his son, *William Maclin Ingle*, continued to act as *Mrs. Nadin's* solicitor in the suit. *Ingle*, the father, had urged *Mrs. Nadin* for payment of the bills, and the son having also become very pressing, *Mrs. Nadin* declared herself unable to pay, except out of the proceeds of the sale of the shares; she complained of the amount of the bills, and expressed a desire to be relieved from all liability in respect of them and future costs. By an order, made in *February*, 1855, the certificates of shares were directed to be delivered to *Mrs. Nadin*; and in *April*, *Ingle* proposed that she should authorize him to sell them and pay the costs of the sale and of the suit, and hand over the surplus to her. This she refused to do, except upon the terms of *Ingle* not looking to her, personally, for payment of any

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deficiency in the proceeds of the sale of the shares answer the costs, the amount of which was unknown her. *Ingle* ultimately agreed to do so; the parties met and *Ingle* produced two documents, purporting to carry out the arrangement, one to be signed by Mrs. *Nadin* and the other by himself, and at the same time delivered two other bills of costs, one for 9*l.* 9*s.* 5*d.*, due to his father, and the other for 115*l.* 1*s.* 8*d.*, due to himself. Mrs. *Nadin* being an illiterate person, *Ingle*, in the presence of two friends who accompanied Mrs. *Nadin* but who were neither of them a solicitor, and quite incompetent to advise her, read over the document which she was to execute. By this document, dated the 28 of April, 1855, *Ingle*, in consideration of his not looking to Mrs. *Nadin* for any money in payment of the bills over and above the proceeds of the sale of the shares, was authorized to sell the shares and stand possessed of the proceeds (in his individual capacity, and not as solicitor or agent of Mrs. *Nadin*), upon trust to pay the bills of costs then due and the costs thereafter to be charged by him in and about the business, and then to pay over to Mrs. *Nadin* the surplus, which, he stated to her, would be 200*l.* or 300*l.* This statement, as explained by his affidavit, was made on the supposition that several years' dividends on the shares were due, but none were really due. Mrs. *Nadin* executed the agreement, protesting, however, against the amount of the bills and *Ingle's* conduct. *Ingle* signed the other paper, and delivered it to Mrs. *Nadin*, but gave her no copy of the document executed by her, and produced no vouchers for the payments charged in the bills. The shares were sold for 463*l.* 15*s.*, and after payment of all costs, *Ingle* tendered to Mrs. *Nadin* 33*l.*, which he alleged was the balance, but she refused to accept it. Mrs. *Nadin* then employed another solicitor, who wrote to *Ingle* for a copy of the document signed by her, and

for vouchers, but he refused to give them, and referred the solicitor to his client for that purpose.

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The common order to tax was then obtained by Mrs. *Nadin*. A motion was now made to discharge it, on the ground that taxation was precluded by the agreement and payment of the bills, and, at all events, that the order should have been obtained on a special application.

Mr. *Lloyd*, and Mr. *Wood*, in support of the motion.

First, taxation is precluded by the special agreement, and the settlement and retainer of the amount; secondly, the order of course was obtained on a suppression of a material fact, viz., the special agreement between the parties, and that alone is a sufficient ground for discharging it.

Mr. *Roupell*, and Mr. *Webb*, *contra*.

Such an agreement as the present between a solicitor and an illiterate person, and without independent professional advice, will not preclude taxation. There has been no payment; *In re Bignold* (a). As it did not prevent taxation, it was unnecessary to notice it, and the conduct of the solicitor in refusing a copy prevented its being stated.

The MASTER of the ROLLS reserved judgment.

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Nov. 5.

The questions which arise in this case are, first, whether the agreement, which was signed by Mrs. *Nadin*, the

(a) 9 *Beav.* 269.

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the client, precludes the taxation of the bills, and it does not, then, secondly, whether it was of sufficient importance to make it necessary to state it to the office of the Court on the application for the taxing order, in which case he would not have granted the order, and special application would have been necessary, for the purpose of obtaining the decision of the Court as to whether the bills ought to be taxed, and lastly, whether there is any excuse for not adopting that course.

In the first place, I have no doubt that the agreement was as stated, viz., one by which, in consideration of *Sarah Nadin* being released from personal liability, the solicitor was contented to look to the produce of the railway shares for the payment of the bills of cost and the client, on her part, agreed to the amount of the bills of costs. Such an agreement might have been perfectly good, if entered into between persons who understood their situation; but such is not the case here. Leaving out of the question that she was a very illiterate person, the bill was delivered at the time, as she had no means of knowing whether it was a proper bill or not, and it was impossible to obtain proper advice. Besides this, it does not appear that the value of the railway shares was known; and if it exceeded the amount of all the bills, she obtained no advantage from the arrangement, and received no consideration for agreeing to the particular amount of these bills. I am clearly of opinion, that the circumstances of this case as appearing from the affidavits, are such, that the Court would not allow the agreement to supersede the taxation of the bills.

As to payment, there was none; the solicitor was to retain, out of money to be received by him, the amount of his bill. Payment must either be actual payment of money

money, or an agreement by the client, on the settlement of accounts between him and his solicitor, that the amount shall be retained.

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The next question is much more difficult, and if a copy of the agreement had been in the hands of Mrs. Nadin, at the time she obtained the order of course to tax the bills, I should have been of opinion that the order of course had not been properly obtained. The circumstances are very peculiar. It is observed, with justice, that Mrs. Nadin was aware that some agreement existed, though she did not know the terms of it. If, when her solicitor applied for a copy of it, Mr. Ingle had furnished one, I should have discharged this order of course. But Mr. Ingle, when applied to, says, "I refer you to your client," he knowing perfectly well that the client had no copy of it, for she could only have it through him, and it had never been out of his possession. She must have known that some agreement existed, but it was not likely that she retained in her memory the particulars of it, for it is one page in length. There is, therefore, some excuse for not setting it out in her petition for the order of course, though she knew there was one. She ought to have applied to the solicitor, and said, "do you object to an order of course?" and if he did, then she should have presented a petition to the Court for taxation, stating that there was an agreement, and that she could not obtain a copy of it.

There is this difficulty in all these cases, that if the agreement be such as not to affect the right to taxation, you need not mention it; but, if on the contrary, there is a point for the decision of the Court before the client could be entitled to an order for taxation a special petition is necessary. It is sometimes very difficult to decide which course

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course to take. I think Mrs. *Nadin* was not right in the course she took, but that the solicitor was wrong in refusing the copy of the agreement; I shall not set aside the order, and I shall give no costs of the motion.

HARLEY v. MITFORD.

Nov. 24.

Where the words "children" and "issue" are used interchangeably in a will, the operation of the word "children" may be extended to "issue generally" to effectuate the intention.

A testator declared, that in case his daughters should "leave issue," they might appoint a fund "unto such children" in "such manner" as they should choose, and, in default of any child, they might appoint it to their sisters and their

children. "And in case all his daughters should die without issue," then over-
Held, that "children" must be construed "issue," and that an appointment to a grand-
child was within the power. Held also, that the word "such" did not refer to the issu-
a daughter might leave, but to such of the class as she might choose.

IN 1800, the testator, *W. Raybould*, by his will, gave his real and personal estate to trustees, upon trust to pay "the rents and profits equally among his three daughters, *Sophia*, *Henrietta* and *Harriet*, for their separate use; "and in case any or either of his said daughters should *leave issue*, then she or they should give, devise, bequeath, limit, direct or appoint her or their share or shares of his real and personal estate unto such *child* or *children*, in such manner and form, as she or they should choose; and in default of any *child* or *children* of any or either of his said daughters, then they or the survivors or survivor of them should and might, respectively, give, devise and appoint the respective shares of his real and personal estate to their brothers or sisters and their or her child or children, in such manner and form as she or they should please.

"And in case all his said daughters *should die without issue*, then the survivor of them should and might give, devise and bequeath his said real and personal estate to such

such person and persons as and in such manner and form as she should think proper."

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After the testator's decease, his personal estate, being got in, was paid into Court and carried over in thirds to the account of the three daughters.

The testator's daughter, *Henrietta*, married Mr. *Wright* and had two children, one of whom, *Emily*, married Mr. *Shey*, and died in 1848, leaving four children, and the other, *Helen Maria*, died in 1837, leaving one child, *Robert Henry Wright*.

In 1838, Mrs. *Wright* appointed 2,000*l.*, part of the fund, to *Robert Henry Wright*, her grandson, and the remainder to her daughter, Mrs. *Shey*, and her children (with her concurrence).

In 1846, she appointed the whole to Mrs. *Shey*, under circumstances which made the validity of the appointment questionable, but the point was not decided on the present occasion.

Mrs. *Shey* died in 1848, Mr. *Shey* in 1852, and Mrs. *Wright* in 1855, and thereupon *Goff*, the legal personal representative of Mrs. *Shey*, presented a petition, praying a transfer to him of her one-third share of the fund.

Mr. *Lloyd* and Mr. *Shebbeare*, in support of the petition.

Mr. *Roupell* and Mr. *Hardy*, for *Robert Henry Wright*.

Mr. *Horsey*, for other parties.

The questions raised were, whether the power to appoint

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point to "such child or children" was not limited to the issue before referred to, i.e., to the issue Mrs. Wright might leave at her death; and, secondly, whether it authorized the appointment to a grandchild. It was contended, on the one hand, that the word "issue" was to be interpreted "children," and, on the other, that the meaning of the expression "children" must, on the context, be extended to any "issue" of Mrs. Wright. The validity of the second appointment was left open, to be decided in another suit. *Wyth v. Blackman* (a); *Goldie v. Greaves* (b) and *Ellicombe v. Gompertz* (c) were cited.

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I think the appointment is good. The words, in the first instance, are "in case any or either of his daughters should leave issue." The expression "issue" is the largest possible and includes descendants at any distance. It is said, that these words must be cut down by the subsequent words "child or children;" but in *Wyth v. Blackman* the Court held, that it was not bound so to do, although if a testator uses the word "issue" as equivalent to "children," the word "issue" must, in such case, be held to mean the children of the parents.

I do not think that the words "*such* child or children" refer to such issue as the daughter might leave at her death, but to the persons to be selected by her: she was to appoint to *such* children as she should choose. If the will had stopped at the words "unto such child or children" the case would have resembled *Goldie v. Greaves* (b), but it proceeds "in such manner and form as she or they should choose." It is clear, that the words "such" and "manner"

(a) 1 Ves. sen. 195.

(b) 14 Sim. 348.

(c) 3 Myl. & Cr. 127.

"manner" refer to the choice and selection of the children. It is to be observed, that in the next gift, "in default of any child or children," the word "leaving" is omitted; this strengthens the construction. The testator afterwards proceeds, "and in case all his said daughters should die without issue," then the daughter might appoint the fund as she thought proper. This is only consistent with giving to the word "children" the extended meaning, and with an intention that the grandchild might be entitled to take. The ultimate gift over is in default of any issue, and is most distinct in shewing that it was only to go over on a failure of issue generally. If the words had been "if all his daughters should die without any *such* issue," or any thing to limit the word issue, there might be something in it; but the expression is general,—if they all died without any descendants whatever.

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I am of opinion, that, by the effect of these clauses, the expression "child" is to be enlarged and means "issue," and that the daughters had a power of disposition in favour of any descendants, whether children or grandchildren.

Therefore let 2,000*l.* stock, and interest thereon at 4*l.* per cent. from the death of Mrs. *Wright*, be transferred to a separate account, in respect of the interest of *Robert Henry Wright*, who must file a bill to bring his claim before the Court.

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WALKER v. ARMSTRONG.

An appointment, made in 1840, of the whole fee, under a power in a settlement of 1825, relimiting, in substance, the old estates, though made for the purpose and with the sole intention and object of introducing a limitation omitted from the settlement by mistake. Held, to be a revocation of a will made in 1827 in pursuance of a power in the settlement of 1825.

THE question in this case was whether, upon the construction and effect, under the circumstances, of a deed made in execution of a general power of appointment contained in a settlement, a will, made also in execution of a power in the same settlement, but prior to the deed and the Wills Act, was or not revoked by the deed, the sole intention and object of which was simply to correct a blundering omission in the settlement, and the estates being thereby substantially limited to the old uses.

The facts of the case, which are fully stated in the judgment, are shortly as follows:—On the marriage of Mr. and Mrs. *Walker*, in 1824, two estates, belonging to the lady, were settled to such uses as Mr. and Mrs. *Walker* should jointly appoint, and in default

In such a case parol evidence is inadmissible to show what was the intention or object of the parties.

On the marriage of *A.* and *B.* in 1824, two estates belonging to *B.*, the wife, were vested in trustees upon certain trusts in favour of *A.* and *B.* and the issue of the marriage, but by mistake no provision was made for the daughters of any son of the marriage, and, as to one of the estates, no power of disposing of it was given to *B.* in case there should be no issue of the marriage. The blunder being discovered, *A.* and *B.*, in 1825, under a general power of appointment given them by the settlement, paramount to the limitations therein, relimited the estates to the old uses (except as to the life estates to themselves and the survivor of them, which were omitted by a second mistake), and they supplied the omission in the original settlement. There being no issue, *B.*, in 1827, made her will in pursuance of the power "reserved to her by the original settlement and every other power enabling her in that behalf." The second blunder being afterwards discovered, in 1840 *A.* *B.*, under the general power, appointed to the old uses, and supplied the second omission. This deed of appointment recited the intention of *A.* and *B.* to vary the limitations, but it was clear, in the opinion of the Court, that the sole intention and object of the appointment was merely to cure the second blunder. Held, nevertheless, that the will of *B.* was revoked. But upon appeal, the Lords Justices, on an altered record, reformed the deed of 1840, and so gave effect to the will.

default of appointment, each was settled upon certain trusts in favour of Mr. and Mrs. *Walker*, and the issue of the marriage, with divers remainders over. By mistake, no provision was made for the daughters of any son of the marriage, in case he should have no issue male; and, as to one of the estates, a general power of disposing of it by deed or will, after the decease of the survivor of Mr. and Mrs. *Walker*, was reserved to her; but, as to the other estate, no separate power of disposition was reserved to her, even on failure of issue of the marriage.

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In the year 1825, these several mistakes having been discovered, Mr. and Mrs. *Walker* exercised the general power of appointment reserved to them by the settlement of 1824, and, correcting these two blunders, re-limited the estates generally to the old uses, including the powers to Mr. and Mrs. *Walker* jointly, and to Mrs.

Walker separately; but, by another mistake, the life estates limited to Mr. and Mrs. *Walker* by the settlement of 1824 were omitted. In this state of things, and there being no issue of the marriage, Mrs. *Walker*, in 1827, made her will, and thereby, after reciting the original settlement of 1824, she, "in exercise and execution of the power or authority so given or reserved to her in and by the above recited indenture of release as aforesaid, and of every or any other power and authority enabling her in that behalf," appointed the estates to the Plaintiffs and Defendants, the bulk of the property being given to her husband, one of the Plaintiffs.

The blunder in the deed of 1825, being discovered in 1837, a third deed was executed in 1840, whereby, after reciting the two previous deeds of 1824 and 1825, and that Mr. and Mrs. *Walker*, "were desirous of varying the limitations" therein, they exercised the joint power given them by both the former deeds, or either
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of them, relimiting the estates to the old uses (except as to the issue of the marriage, there being then, humanly speaking, no probability of any, as Mrs. Walker was fifty-nine years of age), and curing the omissions. Mrs. Walker died in 1854, without issue, and without having republished her will.

Affidavits were put in evidence to shew, that the sole intention and object of the deed of 1840 was to rectify the mistake in that of 1825.

The question was, whether the will was revoked by the execution of the deed of 1840.

Mr. R. Palmer and Mr. Cole, for the Plaintiffs. In the first place, it may be contended, that the life estates, which were by a blunder omitted in the deed of 1825, executed to cure a previous error, and for no other purpose, were not entirely lost or destroyed, but resulted back to the husband and wife, or if it should be thought that, on the principle of resulting uses, they did not so result back, yet it is clear, in equity, that the life estates were such that the Court would have rectified the settlement, and in so doing would not have given the husband and wife life estates, but would have declared they were entitled to them, and would have directed the terms of the deed to be altered accordingly. But it is said, that the operation of the deed of 1840 was to destroy the old estates, and create entirely new uses, and that, therefore, the will of Mrs. Walker had nothing to operate upon. But the question is, what was the purpose for which the deed of 1840 was executed. If it was executed for the purpose of raising an entirely new series of limitations and exhausting the fee, then no doubt it would put an end to the old estates, and the uses and powers contained in the previous deeds would be gone, and the power in the deed of 1840 would be a new power,

power, and not the old power in the deed of 1825 as it is; but if the whole object and intention of the deed of 1840 was simply to vary the limitations, and not to destroy the existing estates—if it was intended merely to fill up a gap, then it will operate only as a partial execution of the power. Now the truth is, that the deed was executed only to correct, through the medium of the joint power, an error in the former deed. This is evident from the recital in the deed of 1840 itself, that Mr. and Mrs. *Walker* “were desirous of varying the limitations contained in the said recited indentures,” namely, the deeds of 1824 and 1825, and also from the affidavits which have been filed to shew the state of circumstances that existed at the time of the execution of the deed of 1840. These affidavits are not indeed admissible in evidence, for the purpose of helping to put a construction upon the deed, but it is competent for the Plaintiffs to use extrinsic evidence to shew the state of things which existed at the time of its execution, as in the case of a will, in order that the Court may see under what circumstances the instrument was made, and, therefore, these affidavits have been filed to shew, under what circumstances the deed of 1840 was executed. The recital in the deed is also to the same effect; consequently the object then being to vary, not destroy, the old estates and uses, they remain unaltered, except to the extent and for the purpose of correcting the blunder, and except to that extent, the uses, limitations and powers of the deed of 1840 are the old uses, limitations and powers. This is like the common case of bringing home the legal estate to the equitable estate, and clothing the latter with the former, which leaves the old estates untouched. All the cases lay down that doctrine; as where a party has the legal estate and a power, and exercises the latter by appointing the estate to new uses, in favour of a mortgagee, that only revokes or alters,

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pro tanto, the previous uses and limitations which, except for the purpose of the mortgage, remain just as they were before the appointment; *Brain v. Brain* (a); and even though the power in such a case is wholly exhausted at law, still it is but partially executed in equity; 1 *Sugd. Pow.* (b), where several cases were referred to, and among others, *Anson v. Lee* (c), which was the common case of an estate in settlement, and a subsequent mortgage and transfer, with an inaccurate proviso for redemption, altering the uses, but without any declared intention to do more than secure the mortgage, nevertheless the effect was to revoke a previous will. This case Lord *St. Leonards* comments on with disapproval, and in the end, 1 *Sugd. Pow.* (d), says, "it would be difficult to reconcile the distinction in *Anson v. Lee* with the principles as exhibited by Lord *Eldon* and Lord *Redesdale*." There is a recent case, on the same subject, first before Vice-Chancellor *Kindersley* and then before the Lords Justices, *Plowden v. Hyde* (e), in which a person, having had certain hereditaments conveyed to him to such uses generally as he should by deed or will appoint, and in default of appointment to the usual uses to bar dower, mortgaged them in fee, the dower trustee joining in the mortgage, then made his will devising them, and afterwards the mortgagee reconveyed them to him and his heirs to such uses generally as he should by deed or will appoint, and in default of appointment to the usual uses to bar dower, just as they stood before the mortgage; and it was ingeniously contended, that the powers, uses and estates were quite distinct, and that, therefore, the devise was revoked. Vice-Chancellor

Kindersley(a) 6 *Madd.* 221.

(b) Pages 359, 361 (6th ed.)

(c) 4 *Sim.* 364.

(d) Page 367 (6th ed.)

(e) 2 *De G., M. & G.* 684,
overruling *S. C.* 2 *Sim. (N. S.)*
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Kindersley thought, there was a revocation, but the Lords Justices differed with him, and overruled his decision. That is a very strong authority, and there is none on the other side to shake it. As in the case of a mortgage, so also in that of a tenant in common whose will is not revoked by the fact that his share has, since the execution of the will, been ascertained in severalty by partition. A fine levied, for the mere purpose of effectuating a partition, is no revocation even at law; *Williams v. Owens* (a). But if the object and intention of the parties to any disposition be, not merely to effectuate a partition, but also to answer some other purpose, as in the case of *Tickner v. Tickner*, cited in *Parsons v. Freeman* (b), there, there will be a revocation. So in *Woodhouse v. Okill* (c) and similar cases, a partition did not revoke a person's will. In 1 *Rolls Abr.* (d) it is laid down, that a feoffment after a will, though declared to the uses of the will, and where, therefore, the testator takes back the old uses, was held to be a revocation, but that affects the whole estate, and, nevertheless, Lord *Hardwicke*, in *Parsons v. Freeman* (e), declared that case of the feoffment to be "a prodigious strong case." In *Parsons v. Freeman*, a wife, by marriage articles, contracted, that on her husband doing certain acts, she would convey her estate to him and his heirs. The husband then made his will, devising his equitable interest to a third party in fee. The husband and wife then came to a new agreement, by which the uses were to be limited, not to the husband absolutely, but to such uses as the husband and wife should jointly appoint, and in default to him in fee, and suffered a recovery, declaring the purpose to

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(a) 2 *Ves. jun.* 601.
(b) 3 *Atk.* 742.
(c) 8 *Sim.* 115.

(d) Page 616.
(e) 3 *Atk.* 748.

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to be to the uses of that deed; and this was held a revocation of the will, because the husband was to take absolutely in the first instance, but afterwards subject to the joint appointment. The principle of all the cases is, that where the conveyance or limitation of the estate is to effectuate a particular purpose, it shall revoke a previous will no further than to answer that particular purpose. Upon this principle, accordingly it is submitted, upon the part of the Plaintiffs, that as there was no intention, when the joint power was exercised by the deed of 1840, to revoke the use further than to vary the limitations so far as to correct the blunder as to the life estates, the will is not revoked or is only revoked *pro tanto*; *Rawlins v. Burgis* (a); *Wigsell v. Smith* (b); *Montagu v. Kater* (c); *Evans Saunders* (d); *Attorney-General v. Vigor* (e); *Hawes Wyatt* (f). There is another point which may briefly mentioned, namely, whether the statute 1 Vic. c. 26, does not prevent what has been done from operating as a revocation, for though it does not extend to wills made before 1838, yet, by those sections which relate, not to the making or construction of a will, but to its revocation, viz. the 19th, 20th, and 23rd sections, revocation must be of the nature pointed out by the *Hobbs v. Knight* (g).

Mr. Borton, for the Defendant Robert Baynes Armstrong, did not oppose the Plaintiff's case.

Mr. Prendergast, for the Defendants Mr. and Mrs. Pattenson, argued in favour of the Plaintiff.

Mr. Roupell and Mr. Pole, for Richard Baynes Armstrong

- (a) 2 Ves. & B. 382.
 (b) 1 Sim. & St. 321; 5 Russ. 299.
 (c) 8 Exch. 507.
 (d) 1 Drew. 415, 654, reversed

- on appeal, 24 L. J. (Ch) 609.
 (e) 8 Ves 256.
 (f) 3 Bro. C. C. 156, reversing S. C. 2 Cox, 263.
 (g) 1 Curt. Excl. Rep. 768.

strong. The proposition contended for is, that the will of 1827 operated as a valid disposition of the property under the power contained in the deeds of 1824 and 1825, which was the same as that contained in the deed of 1840; and it is argued, that, notwithstanding the deed of 1840, the power is well executed. But if the power given by the deed of 1840 is a new, and not the old power remaining unaltered, then the will does not operate as an execution of that power, nor can it operate as an execution of the old power, which is gone. It is argued, that the power is only revoked *pro tanto*, and a passage in *Sugd. Pow. (a)*, is relied upon. [*The MASTER of the ROLLS.* Suppose it had been stated in the deed of 1840, that in the deed of 1825 the life estates to the husband and wife had been omitted, and, to remedy that omission, the deed of 1840 was executed, would you consider that to be a revocation of the will of 1827?] Yes, it was clearly an exercise of the power in the deed of 1840, which could not, therefore, be exercised by the will, being exhausted and at an end; *Reid v. Shergold (b)*; *Leigh v. Norbury (c)*; *Lawrence v. Wallis (d)*; *Lock v. Foote (e)*; *Simpson v. Walker (f)*; *Huband v. Huband (g)*. There is nothing in the deed of 1840 to shew, that it was not intended to execute the power fully, and the deeds alone can be looked to as evidence of the intention of the parties. The case, moreover, is one, not of the revocation, but of the destruction of the power; and though the evidence cannot be looked at to explain the instrument, yet it may be so to give the Court some knowledge of the circumstances. Now a vast deal has been said, as to the want of intention; but the facts are, that certain deeds

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(a) Vol. 1, page 359 (6th ed.)
(b) 10 Ves. 370.
(c) 13 Ves. 340.
(d) 2 Bro. C. C. 319.

(e) 5 Sim. 618.
(f) 5 Sim. 1.
(g) 7 Bro. P. C. 433.

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deeds had been executed, and, on considering them afterwards, it was found that they had failed to provide for certain contingencies, not that there was a mistake or any intention to rectify the mistake, there were defects, and if evidence had been tendered as it is not, with a view to correct those errors or defects it would not be received, and in effect, it would assist the Court. Parol evidence as to what was the intention of the parties in executing the deed of 1840 is not admissible, and even if it were, the Court would not rectify the settlement without production of the instructions for the deed; *Cordwell v. Mackrill* (a) in which case the Court refused to carry into execution a settlement made in pursuance of marriage articles without the production of the articles. As to the effect of the statute 1 Vict. c. 26, it was held in *Lord Lifford v. Little* (b), that the statute is wholly inapplicable to such a case. *Mansell v. Price* (c), was cited as a resulting trust.

Mr. Lloyd and Mr. Osborne, for the Defendants *Anthony Brown* and his son *Thomas Brown*, the tenant in tail in *esse*, under the deeds. The 29th paragraph of the bill raises the question of the rectification of the settlement. [The MASTER of the ROLLS. You need not trouble yourself as to the question of rectifying the settlement. All that was meant to be urged on the part of the Plaintiffs was, that the case might be treated for the purpose of introducing the parol evidence. I do not consider this a bill to rectify the settlement, and I look only to the documents. Plaintiffs are entitled to have the facts of the case being fifty-nine in 1840, and there being then no

(a) 1 *Ambl.* 515; 2 *Eden*, 344.

(b) 2 *Jones & Lat.* 613.

(c) *Sugd. Pow. App.* 21.

dren put in evidence, and I shall treat those as facts.] It is argued, that this deed of 1840 is a revocation of the will, and the question then turns upon the reasoning applied by the Court to revocation. This may be a revocation, but it is not a revocation in the ordinary sense of the term. You apply it to the destruction of the power, on the subject matter itself being withdrawn; as if a testator disposes of part of the property, he withdraws it from the operation of the power, and that is a partial revocation; so, in the case of a mortgage, &c.: but this is a different case. The question here is a question of testamentary capacity; and whether the testamentary instrument was executed by virtue of a testamentary capacity, which existed in this lady at her death. The testamentary capacity in 1827 was not the same as at the lady's death, the former was put an end to in 1840, and superseded by a new testamentary capacity; and the real question is, whether the power introduced into the deed of 1840 was a new power. It is contended, that the intention of the parties is to determine this question, but it cannot be said, that parties do not intend the legal consequences of their own acts and deeds. They must not do acts and then be allowed to say, "that particular legal consequence is a surprise upon us." [*The MASTER of the Rolls*. My present impression is, that the parties never thought about the will, or whether it would be revoked or not.] The will being dated in 1827, and the death of the lady not having taken place till 1854, an interval of twenty-seven years, it must be considered that there was an abandonment of the intention in 1827, before her death. There is an alteration of the testamentary capacity. There is an analogy in the cases where, before the Wills Act, a woman made a will and afterwards married; there her testamentary capacity

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 testamentary capacity revived, the will was nevertheless of no effect. There must have been uninterrupted testamentary capacity from the date of the will to the death. Here, if the parties had in 1840, executed a deed identical with the previous deed, the powers would be gone. The joint power was exhausted by its exercise, but it need not have been so, as if, for instance, they had, under the power, simply appointed the old life estates, leaving every thing else as it was. But in 1840 there was a change of circumstances, and therefore change of intention.

Mr. R. Palmer, in reply.

The MASTER of the ROLLS took time to consider.

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The MASTER of the ROLLS.

In this case, the question arises on the construction and effect of certain instruments, and whether, by the last of them, the will of the testatrix is or is not revoked.

It is impossible to look at this case without feeling how little creditable to the profession, generally, are the facts appearing in this suit, and how serious, whatever may be the ultimate result of this suit, the consequences must be to the parties immediately concerned, occasioned by the reiterated and inexcusable blunders of the professors of the law.

The outline of the case is this:—A lady, in affluent circumstances, possessed of large landed estate, married a gentleman distinguished in the naval service of the country.


country. They apply for and obtain what may be considered as the best advice they could, in order to frame a settlement of their property.

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This settlement contains a blunder occasioned by gross negligence. This is discovered shortly afterwards, the best advice is then resorted to by this lady and gentleman to redress this evil, and the blunder is repaired by another instrument, which contains another and fresh blunder, still more gross, occasioned by a piece of negligence as inexcusable.

This again is discovered, and is attempted to be repaired by a third instrument; but the lady and her husband are never informed of the probable or possible effect which the execution of this third instrument would produce on their previous acts, and that, according to the technical rules of this Court, which none but a professional person could understand, the last wishes of the lady, solemnly expressed in her will, would be wholly inoperative, or that, at the best, a long, doubtful and expensive litigation would be necessary, to set it right. Most assuredly, if the Court must declare that this third instrument has rendered the will of this lady inoperative, it cannot but feel, that the real intentions of this lady, in the disposal of her property, have been frustrated, and that the objects of her bounty are deprived of the fruits of it, by the combined effect of the incompetence of certain members of the legal profession, operating upon a mere technical rule of law founded in no principle of common sense or justice.

The facts, as far as they need be explained, are as follows:—The Plaintiff, Captain *Robertson Walker*, married his late wife in *June*, 1824. On that occasion, a settlement was made of the lady's property, consisting of

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of two estates, one of which may be called "her own," and the other which was derived from her brother, who was then dead, may be called "her brother's." By that settlement, both estates were conveyed to three trustees, in trust to hold the same for such uses as the husband and wife should jointly appoint by deed, and in default of such appointment, as to one half, to pay the rents and proceeds to Captain *Robertson Walker* during the joint lives of himself and his wife, and as to the other half, to pay the rents and proceeds thereof to Mrs. *Walker*, for her separate use, during their joint lives, and upon the death of either, the survivor was to take the rents and proceeds for life. Subject to these life estates, the estate derived from the brother was limited to such uses as Mrs. *Walker* should appoint, either by deed or will, and, in default of such appointment, it was limited to go to her first and other sons in tail male, with remainder to her daughters, as tenants in common in tail general, with cross remainders between them in tail. In default of such issue, the property was limited to *Robert Baynes Armstrong*, the first Defendant, for life, with remainder to his first and other sons in tail male, with remainder to *Richard Baynes Armstrong*, the second Defendant on the record, for life, with remainder to his first and other sons in tail male, with remainder to *Thomas Benn*, the third Defendant on the record, for life, with remainder to his first and other sons in tail male. The Defendant *Anthony Benn* is his (*Thomas Benn's*) eldest son, and consequently, as neither *Robert B. Armstrong* nor *Richard B. Armstrong* has any issue male, he is the first tenant in tail in existence.

As to the wife's estate, subject to the life estates already stated, it was limited to the child or children of the marriage, in such manner as the husband and wife should

should jointly appoint, and in default, as the survivor should appoint, and in default of any such appointment, the estate was limited to the same trusts as those already stated with respect to the estate derived from the brother, which followed the power given to Mrs. *Walker* to appoint by deed or will. The settlement, therefore, contained no provision for the daughters of any son of the marriage, nor did it contain any power enabling Mrs. *Walker* to dispose of her own estate, in case she should have no issue of the marriage.

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This blundering omission from the settlement was speedily discovered, and Mr. and Mrs. *Walker* desired that it might be corrected. This, by means of the general power of appointment reserved to the husband and wife, might easily have been accomplished, had proper care been taken not to create a fresh blunder in curing the old one. Accordingly, with this view, a deed of appointment, exercising that power, and bearing date the 17th of May, 1825, was duly executed by Captain *Robertson Walker* and his wife, of the first part, and the trustees of the second part. This deed recited the desire of Captain and Mrs. *Walker* to exercise the power of appointment contained in the former settlement, and then proceeded to limit and appoint both the estates to such uses as both husband and wife should by deed jointly appoint, and in default of any such appointment, so far as regards the estate derived from her brother, to such uses as Mrs. *Walker* should appoint by deed or will, and in default of any such appointment, the estate was limited to the first and other sons of the marriage in tail general, remainder to the daughters of the marriage as tenants in common in tail general, with cross remainders in tail, and in default of such issue, as Mrs. *Walker* should by deed or will appoint, and in default of such appointment, to the

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the uses limited by the original settlement to take effect after the limitations to the daughters of Mrs. Walker, and as to Mrs. Walker's own estate, it is, subject to the joint power of appointment, and subject to the uses in the original settlement limited to take effect during the lives of Captain and Mrs. Walker, and the survivor of them, limited to the same uses as those specified in the original settlement in favour of the children of the marriage, in such manner as Captain and Mrs. Walker should appoint, and in default, to the uses limited to take effect concerning the lands derived from her brother; provided always, that in case there should be a failure of issue of the marriage, Mrs. Walker should have power to appoint the hereditaments settled, by deed or will.

In this deed of appointment, therefore, the former blunders being redressed, a still more serious blunder is made, by omitting, in the settlement of the estate derived from the brother, all the limitations for the lives of Captain and Mrs. Walker, and the life of the survivor. Captain and Mrs. Walker had taken the best advice they could, they had employed eminent professional persons residing in the metropolis, and must naturally have supposed that now, at least, the whole matter was corrected, and that no difficulty could arise on this second settlement. In this view of the case, and in February, 1827, Mrs. Walker made her will, by which she recited the power contained in the original settlement, and by virtue of that and every other power enabling her so to do, devised all the settled lands and hereditaments in the following manner. She gave part to certain persons, members of the *Armstrong* family, and the remainder she gave to the Plaintiff, her husband, Captain *R. Walker*, absolutely.

After the lapse of many years after this, Captain and
 Mrs.

Mrs. Walker having occasion to deal with some portion of their property by way of sale or exchange, the settlements were laid before a professional gentleman, who immediately pointed out the blundering omission which existed in the deed of 1825, and the inconvenience which might result from the omission of the life estates to Mr. and Mrs. Walker. Thereupon, on the 24th October, 1840, Captain and Mrs. Walker again, under the best professional advice, executed a fresh deed to repair this second blunder and defect. To this deed Captain and Mrs. Walker were parties of the one part, and the surviving trustee of the original settlement of the other part. It recited the indentures of June, 1824, and of May, 1825; it recited that Captain and Mrs. Walker were desirous of varying the limitations contained in the settlement, and thereupon, by the joint appointment of both Captain and Mrs. Walker, the estates, as well those derived from her brother as her own, were settled to such uses as Captain and Mrs. Walker should appoint; and in default thereof, during the joint lives of Captain and Mrs. Walker, as to one-half, in trust for Captain Walker, and as to the other half, in trust for the separate use of Mrs. Walker; and after the decease of either, the whole in trust for the survivor for life; and after the decease of the survivor, for such uses as Mrs. Walker should, by deed or will, appoint; and in default of appointment, in trust for the Defendants, for the same estates as those already stated in the original settlement. This deed, it will be observed, omits all limitations in favour of issue, but there were none then, and the advanced age of the lady had rendered future issue, humanly speaking, impossible, and accordingly such limitations were unnecessary. The settlement would have answered its purpose, if the unfortunate objects of this series of blunders had been told what effect it would have upon them, but, from the first to the last, it does not appear that

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that any one ever informed either of them of the effect which this deed might have on Mrs *Walker's* will, if she had previously made one.

In *December*, 1854, Mrs. *Walker* died without issue, without having altered or re-published her will, and without having revoked it, unless the deed of 1840 operated as such revocation. The question in this case is, whether this deed rendered the will inoperative.

In favour of the validity of the appointment made by the will of this lady in 1827, notwithstanding the subsequent deed of 1840, it is urged, that the effect of this settlement depends on the intention with which it was executed by the parties thereto; and evidence is tendered to shew the circumstances under which, and the object for which, that deed was executed, the admissibility of which evidence is contested on the other side. My opinion is, that evidence of this character is not admissible; but I have, upon the mere perusal of the deeds themselves, come to the conclusion, that the sole object and intention of the parties to the deed of *May*, 1825 was to redress the blunders of omitting the interests to the daughters of sons of the marriage, and to give Mrs. *Walker* a power of disposing of her own estate by will, in case there should be no issue of the marriage; and also that the sole object of the deed of 1840 was to redress the blunder of the deed of 1825, which omitted the life estates of Captain and Mrs. *Walker* and that the omission of the limitations to the issue of the marriage is explained by the fact that no such issue then existed, and that the advanced age of Mrs. *Walker* made the birth of a child, humanly speaking, impossible; and that, therefore, these limitations were omitted as superfluous and needlessly lengthening the deed. No evidence could, to my mind, make this more plain. In all other respects, the limitations contained in the

deed are

deed are the same. The Plaintiffs, therefore, in my opinion, are entitled to every advantage that can be derived from the fact, that the deed of 1840 was executed with the sole view and object of correcting the error in the deed of *May*, 1825.

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In this state of things, it is contended for the Plaintiffs, that this is analogous to the cases of mortgage and of partition, and that the appointment of the estate to new uses in favour of the mortgagee only revokes or alters the previous uses and limitations *pro tanto*, and that they, except for the purpose of the mortgage, remain unaltered; and, as is the case of a tenant in common, where the will is not revoked by the fact that his share has since been ascertained in severalty by partition.

On the other hand, it is contended for the Defendants, that the estates themselves which were the subject of the devise of 1827 are gone, and that, under the deed of 1840, Mrs. *Walker* had a separate and distinct power of appointment, which has never been executed.

I have delayed my judgment for a considerable time, in the hope that I might be successful in discovering reasons by which this will might be supported; but it is with much pain that I feel myself obliged to come to the conclusion that this cannot be done. Even putting it in the most favourable light for the Plaintiffs, it is clear that there has been a disturbance of the seisin of Mrs. *Walker* by the limitation to the new uses. I do not know that it has ever been decided that a disturbance so created is identical, in effect, with the disturbance of a seisin created by a common law conveyance; but I can see no ground for holding that the effect is different, so far as regards the validity of a will previously executed and not affected by the provisions of the statute of 1 *Vict.* c. 26. I have been desirous to

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find reasonable arguments which would enable me to hold that an appointment under a power paramount to the whole fee in form, and which, in substance, re-limits the old estates, is an appointment only to the extent of the new uses; but that, so far as the old uses are concerned, which are re-limited, it is a mere nullity, and that, in fact, it simply does not displace the old uses. But I am of opinion that such a proposition cannot be maintained, and that no distinction exists between the old uses and the new ones limited under the execution of a power paramount to the whole estate. They are, in fact, all new uses and new estates, though given to the same persons and for the same purposes, and affecting the same piece of land. It is true that, with respect to mortgages, the mortgage is merely a revocation *pro tanto* of the previous uses; and the mere form of the reservation of the equity of redemption, as Lord Redesdale observed in the case of *Innes v. Jackson* (a), is not of itself sufficient to alter the previous title. In fact, the limitations are, in that case, to be explained by the previous title, and a limitation inconsistent with it, and not shewn clearly to have been intended by the parties to it, is treated as a mistake, and a resulting trust arises in favour of the old uses. Accordingly, if the wife's estate is mortgaged and the equity of redemption is reserved to the heir of the husband, a resulting trust arises in favour of the wife and her heirs; but the execution of the power takes the part appointed entirely out of the settlement; and in that case, no resulting trust arises in place of the old ones; in fact, they are new estates. Here the part appointed is the whole property, and, in favour of Mrs. Walker, there is created a new power to appoint by will, and the old power to appoint by will is destroyed, and all instruments exercising that power are destroyed, and fall with the power itself.

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(a) 1 Bl. O. S. 104.

the cases in which this principle is enunciated, and distinctions taken, are numerous, and were for the part commented upon in the argument of this case. In addition to those which were then cited, I may refer to *Case v. Holford* (a), and to *Vawser v. Jeffrey* (b), on rehearing (c), and before the Court of King's Bench (d), on a case sent from Chancery. In that case, conveyance of an estate to trustees and their heirs to be a jointure, and subject to the term created for the purpose, to the deviser and his heirs, with a covenant to surrender copyhold estates to the same uses, was held to revoke the will as to the freehold. The decision was principally occasioned by the question, whether the covenant to surrender the copyholds had the same effect, and it was finally determined, against the opinion of Sir William Grant, that it had no such effect; but that distinction between a conveyance of a freehold and a mere covenant to surrender copyholds, is not applicable to or available in the present case.

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If the cases cited in argument, that of Lord Langford v. Little (e), bears very materially on the question before me; it is, in fact, decisive of the present question, and is not, I think, distinguishable from it. It was to the same effect:—A deed of 1829 had been executed by the father of Lord Langford, by which an estate in Ireland had been settled to various uses, with an ultimate limitation of the fee to Lord Langford, and the settlement contained a joint power to Lord and Lady Langford to make these uses and to settle new ones. Various settlements were executed, to which it is not necessary to refer, further than to say, that they left the estate subject to the uses of the deed of 1829. In this state of things,

(a) 3 Ves. 650.  
(b) 16 Ves. 519.  
(c) 3 Russ. 479.

(d) 3 Barn. & Ald. 462.  
(e) 2 Jones & Lat. 613.



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things, in *September*, 1836, Lord *Langford* made his will disposing of all his real estates, both in *England* and *Ireland*. After this, in *April*, 1839, Lord and Lady *Langford* executed a deed, exercising the power of revocation and new appointment, by which, as in the former settlement, the ultimate limitation of the estates was to Lord *Langford* in fee, Lord *Langford* died immediately after, without having republished his will; it was held, that the will did not operate on the estate limited to him in fee by the original settlement of 1829, and also by the deed of *April*, 1836. The whole of the reasoning of Lord *St. Leonards* in that case applies, strictly and pointedly, to the present case, in all respects. I think it unanswered, and I consider myself bound to follow it.

The case of *Anson v. Lee (a)* was cited before me in favour of the Defendant; but my judgment is in no respect founded on that case, the authority of which has been much doubted, and which, in truth, seems scarcely consistent with the doctrines laid down by Lord *Redesdale* in the House of Lords, in the case of *Innes v. Jackson*.

The cases of *Montagu v. Kater (b)*, and *Evans v. Saunders (c)*, do not, in reality, apply here. All that was there decided had reference to a case, where the power to appoint having been executed in a manner which reserved a power to revoke the limitations so appointed, and to appoint fresh ones, the exercise of the second power, revoking the limitations last appointed and not limiting the estate to any fresh uses, was held thereby to set up and restore the limitations originally existing

(a) 4 *Sim.* 364.

(b) 8 *Exch.* 507.

(c) 1 *Drew.* 415 and 654; re-

versed on appeal, 24 *L. J.* (N. S.)  
*Ch.* 609.

existing in default of any appointment; that is quite distinct from the present case; here all the limitations and the power itself which had been executed by the will of Mrs. Walker have been destroyed by the execution of the general and paramount power of appointment; they did not continue to exist any longer; and with the power falls the instrument by which it was executed; the old limitations and powers in fact are not revived. If this view be correct, it follows, that the will is nugatory, unless it can be successfully contended, that a person could exercise a power by anticipation, and that the person who is to become the donee of a power can exercise the power before it really exists. But this, in my opinion, cannot be reasonably argued.

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The observations I have made have already disposed, by anticipation, of the argument derived from the case of *Hobbs v. Knight* (a),—derived from the retrospective operation of the Statute of Wills of 1 Vict. c. 26, with respect to the revocation of wills then existing prior to that statute, by means of acts done subsequently to the 1st January, 1838. That decision appears to me to be perfectly correct, and I should certainly follow it, if the occasion for it arose; but I think that it does not apply to the present case. This is not the case of the revocation of a will, but it is the case of destroying a power, by the exercise of which alone the will could have any validity; it is as if the estate itself was gone, over which the devise was to operate. I am, therefore, compelled to adopt almost the words of Lord St. Leonards, in *Lord Langford v. Little*, on this point; these sections of the Wills Act assume that the will would, by its own operation, unless it were for the act of revocation, pass the estate which the testator had power to dispose of at his

(a) 3 Curteis, 768.

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his death, but they do not affect wills which attempt to dispose of an estate over which the testator had no any power at the date of the will. The interest which was devised in that case, as in the present, had ceased to exist, by reason of subsequent conveyances, and the will cannot operate upon a new and altogether different estate, although it be in the same lands. I am, therefore, compelled, though with great regret, to come to the conclusion, that the blunders of the profession and the pitfalls of the law have frustrated entirely the intentions of this lady, and made her die intestate, although she had, as she believed, made a will disposing of her estate, and although she had a full complete power to do so, and had taken the best advice she could as to the mode of doing it.

It is not, however, for me to attempt to alter the law; my province is to declare what it is, regardless of the consequences; and if I were to attempt to travel beyond this, I should, if not stopped by a higher tribunal, probably produce still greater evils than those I am tempted to redress, by unsettling titles and disturbing the possession of persons who had become possessed of property, the title to which rested on the principle which might have unsettled.

The result is, that this bill must be dismissed, without costs.

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NOTE.—On Appeal before the Lords Justices, 19 July, 1856, the will was made to operate, by reforming, upon an amendment of the bill, the deed of 1840.

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## DUNCAN v. CANNAN. (No. 2.)

Nov. 6.

IN the marriage of *Andrew Duncan*, a domiciled Scotchman, with *Harriett Grace Inkson*, a domiciled Englishwoman, a settlement, in the Scotch form, and 31st July, 1826, was made and executed by the married husband and wife, whereby, in consideration of a settlement made by Mr. *Duncan* on his intended wife, "assigned and made over to and in favour of herself the said *Andrew Duncan*, her promised spouse, in *undivided fee and life rent*, and the child or children that should be procreated of the said intended marriage, as well as aforesaid, whom failing the said *Harriett Grace Inkson*, her heirs and assigns whomsoever, in fee, estate, funds and effects heritable and moveable, real personal, presently belonging or due and addebt due, or that may be acquired by her during the subsistence of the said intended marriage."

This settlement, construed according to the Scotch law, gave a life interest in after-acquired property of the husband to the husband, and the *corpus* of the property to the wife herself. See *Duncan v. Cannan* (a).

After this, *Lewis Inkson*, the father of Mrs. *Duncan*, died in 1836, having, by his will, directed his trustees, among other things, to invest 2,000*l.* and pay the income thereof to Mrs. *Duncan* for life, for her separate use, without power of anticipation, and after her decease to *Duncan* for life, and after the death of the survivor,

A Scotch marriage settlement gave to the husband a life interest in all property belonging to the wife or that might be acquired by her during the marriage, and the *corpus* to the wife herself. Afterwards, the wife became entitled, for life, to a legacy of 2,000*l.* for her separate use, without power of anticipation, with remainder to her children. Held, that the husband and his assignees took no interest in the fund, notwithstanding the settlement, and that the result would have been the same, if the clause against anticipation had been omitted.

upon

(a) 18 Beav. 144.

1855.

DUNCAN  
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upon trust, as to the *corpus*, for the benefit of their children.

In *January*, 1848, Mr. *Duncan* became bankrupt, and his assignees, who had taken his life interest in other funds given by the will of the testator, claimed to be entitled, by virtue of the settlement, to the dividends of the consols, in which the 2,000*l.* had been invested during *Duncan's* life. The stock was paid into Court by the surviving trustee in *May*, 1855, to the credit of the cause. Two petitions were now presented; one by the Plaintiff, Mrs. *Duncan*, praying payment of the dividends to her for life for her separate use, and the other by the assignees, claiming the dividends during the life of Mr. *Duncan* under the marriage settlement.

Mr. *R. Palmer* and Mr. *Hemming*, for the Plaintiff

Mr. *Roupell* and Mr. *Rudall*, for the assignees.

Mr. *Lloyd*, Mr. *Giffard* and Mr. *Roberts*, for other parties.

*The MASTER of the ROLLS.*

I am of opinion, in this case, that Mrs. *Duncan* is entitled to the dividends, and that the assignees take nothing. It makes no difference whether it is a Scotch or an English settlement as regards the question at issue. Though the settlement is a Scotch settlement, its construction was determined by the evidence in the cause, and, therefore, it is the same thing as if it had been an English settlement, having the construction, which, upon the evidence of the eminent witnesses, whose opinions were taken, I have already put upon it. The only question was as to the *jus mariti*, and the Scotch lawyers declared, that that was preserved by the settlement property

property given to the wife, that is, that though the wife was entitled to the *corpus* of the property, the husband was entitled to a life interest therein.

1855.

~  
DUNCAN  
v.  
CANNAN.

Mr. *Inkson*, the father of the Plaintiff, by his will, gave no interest to the Plaintiff in the *corpus* of the stock to be purchased with the 2,000*l.*, but he gave her merely a life interest therein for her separate use, and excluded the *jus mariti*; therefore, the restriction against anticipation is not material, for the limitation to the separate use of the Plaintiff is sufficient without it to exclude the husband's rights under the marriage settlement. Mr. *Roupell* was compelled to argue, in the only way in which the case could be argued, on behalf of the assignees, that the dividends, as they accrued due, were to be treated as subsequent sums which the Plaintiff might dispose of as they became payable, and as if they were then given. But that would destroy the father's intention, that the Plaintiff should have the dividends for her separate use for life; and would moreover be a strained and forced construction. On that view of the case, the assignees would only be entitled to have the dividends invested and turned into capital and to receive the interest of such capital.

The order must be to pay the dividends to the Plaintiff and the petition of the assignees must be dismissed with costs.

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1855.

*In re* INKSON'S Trusts

and

*In re* THE TRUSTEE RELIEF ACT (10 & c. 96.)

Nov. 26.

Under a marriage settlement, the husband was entitled to a life interest in all the wife's after-acquired property. The husband became bankrupt, and obtained his certificate. The wife afterwards became entitled to the residuary estate of her deceased sister, as next of kin. Held, that the assignees were not entitled to the husband's life interest in this property.

BY the settlement made in 1826 on the marriage of *Andrew Duncan* and *Harriet Inkson*, the husband was held to be entitled to a life interest in all the wife's personal estate, or that might be acquired during the subsistence of the marriage; *Duncan v. Cannan* (a). In 1848, *Duncan* became bankrupt, and obtained his certificate.

*Anne Inkson*, a sister of *Mrs. Duncan*, was wholly entitled to some funds vested in the husband as trustee. *Anne Inkson* died in August, 1855, upon which her sister, *Mrs. Duncan*, who was the next of kin and administratrix, claimed the funds transferred to her. The trustee paid the money to the Court, under the provisions of the Trustee Relief Act (10 & 11 Vict. c. 96), on the ground that *Mr. Duncan* being entitled to a life interest therein by virtue of the settlement, his assignees could claim the benefit of the provisions in the marriage contract in favour of the husband, and demand payment of the dividends during his life.

*Mr. and Mrs. Duncan* now presented a petition for payment out of Court to them of the money.

(a) 18 Bear. 128 and ante, p. 307.

Mr. *R. Palmer* and Mr. *Hemming*, in support of the petition. Until the death of *Anne Inkson*, the interest of Mrs. *Duncan* in the funds belonging to her was a mere expectancy or bare possibility, and the husband's derivative interest under the settlement was no more than a similar expectancy or possibility, till the death of *Anne Inkson*, and having no actual vested interest until after he obtained his certificate, it did not pass to his assignees. At all events, Mrs. *Duncan* was entitled to receive the money in her character of administratrix.

1855.  
In re  
INKSON'S  
Trusts  
and  
In re  
The TRUSTEE  
RELIEF ACT.

Mr. *Roupell* and Mr. *Rudall*, for the assignees. The settlement amounted of course to a contract for valuable consideration, between the intended husband and wife, and every benefit to which the bankrupt was entitled under that contract passed to his assignees. This was a future equitable interest, and was comprised in the contract, and therefore passes to the assignees; for the contract existed before *Duncan* became bankrupt and obtained his certificate. [*The MASTER of the ROLLS.* The words "future interest" are not in the act. The expression is, "all the present and future personal estate" of the bankrupt, and all property which may come to him before his certificate (a).]

Mr. *Lloyd* and Mr. *Giffard*, for the trustee.

*The MASTER of the ROLLS.*

I am of opinion, that the life interest of Mr. *Duncan* in these funds does not pass to his assignees. I have no doubt, that the assignees are entitled to the benefit of contracts in favour of the bankrupt, but that principle has

(a) See 6 Geo. 4, c. 16, ss. 12, 12 & 13 Vict. c. 106, s. 141.  
63; 1 & 2 Will. 4, c. 56, s. 25;



1855.

*In re*  
**INKSON'S**  
 Trusts  
 and  
*In re*  
**The TRUSTEE**  
**RELIEF ACT.**

has no application to the present case. All that passes to the assignees is an existing interest; but where it is only a mere possibility or expectancy to which the bankrupt would be entitled under the contract, and it continues such till after he obtains his certificate, the assignees have no right. The trust fund belongs to the husband and wife, on the trusts of the settlement. Direct the dividends to be paid to the husband, with liberty to apply. No costs to the assignees. The trustee to have his costs, including the costs of paying in the money, subject, however, to a question as to the part of the fund stated to be erroneously paid in, and to which, if not agreed upon, the Court will direct an inquiry.

1856.

**BLAND v. DAVISON.**

Jan. 15.

A Defendant, having been served with *subpœna*, died before appearance. Held, that the suit could not be revived against his heir, but that the remedy against him, if any, was by original bill.

A suit which has been abated for more than twenty years cannot be revived.

**T**HIS was a demurrer to a bill of revivor, filed in December, 1855, which stated, that in August, 1831, Sir *John Bland* had instituted a suit against *Thomas Davison*, to recover possession of the manor, &c., of *Kippax*, and the family pictures, &c. The bill alleged, that *Thomas Davison* was served with a *subpœna*, but never put in any answer. It did not allege that he had ever appeared.

It alleged, that Sir *John Bland* died on the 17th of March, 1835, leaving the present Plaintiff his heir at law, and that *Thomas Davison* died in 1847, leaving the present Defendant his heir.

The bill simply prayed, that the suit might stand revived against the Defendant.

To this bill the Defendant filed a general demurrer.

Mr.

Mr. *R. Palmer* and Mr. *Wickens*, in support of the demurrer. First, on the face of the bill, it is not shewn that the Plaintiff has any title (*a*); secondly, if he has any, a bill of revivor is not the proper means of asserting it, the original Defendant not having appeared (*b*); thirdly, a bill of revivor, filed more than twenty years after the abatement, is too late, and cannot be supported (*c*).

1856.  
BLAND  
v.  
DAVISON.

Mr. *Bilton contra*. The title is the derivative title of the Plaintiff to the original bill, and need not be set out; the bill is regular in practice, and the lapse of time does not apply to a proceeding pending in Court.

*The MASTER of the ROLLS.*

I am of opinion, that if there were any equity, it could only be asserted by original bill, and that a bill of revivor will not lie.

After this length of time, and after all parties are dead, a bill of revivor cannot be allowed. According to the argument of the Plaintiff, a suit might be revived 100 years after the abatement, in defiance of the rule which the Court has adopted in analogy to the rules of law (*d*).

The original bill itself, as stated here, shews no equity, merely shews a case for an action at law.

The demurrer must be allowed.

(*a*) See *Vigers v. Lord Audley*, Sim. 72; *Griffith v. Ricketts*, Hare, 476 and 49th General Order, 26 Aug. 1841; *Ordines* Jan. p. 178.

(*b*) See *Asbee v. Shipley*, 6 Madd. 296; *Crowfoot v. Mander*, Sim. 396; *Hardy v. Hull*, 14 Sim. 21.

(*c*) See *Mitford's Plead.* 290, 4th ed.; *Hollingshead's Case*, 1 P. Wms. 742; *Earl of Egremont v. Hamilton*, 1 Bull. & B. 516; *Perry v. Jenkins*, 1 Myl. & Cr. 118; *Higgins v. Shaw*, 2 Dr. & W. 356.

(*d*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 632.

1855.

*In re HULL'S Estate.*

Dec. 21 and 22.

Bequest to wife for life, and afterwards to all testator's nephews and nieces living at the death of his wife, namely, all the children of my brother S. H., &c. [naming the greater part, but not the whole of his brothers and sisters, and excepting one of his nieces by name, and giving her a legacy]: Held that this was not a gift to a class consisting of all the testator's nephews and nieces, but to the children only of those brothers and sisters who were specifically named.

THE testator, *Samuel Hull*, bequeathed a sum of 2,500*l.* stock to his wife for life, and proceeded thus:—"and after her decease, I give unto *John Kn* his executors, &c., upon trust, all that principal sum of 2,500*l.*, equally to be divided amongst *all my nephews and nieces* then living, *namely*, all the legitimate children of my brother *Stephen Hull*, and the legitimate children of my sister *Jane Bowcott*, and also all the nephews and nieces of my said wife *Elizabeth Hull*, *namely*, the legitimate children of my sister *Eleanor Tucker*, the legitimate children of my brother *William H* and the legitimate children of my brother *Jeremy E* and of my sister *Ann Wolverton* (my niece, the wife of my late nephew *Thomas Parry*, excepted), share share alike." He then gave the widow of *Thomas Parry* 50*l.*, and appointed his wife and *John K* executrix and executor.

After the testator's death and in 1843, 2,500*l.* were set apart and appropriated by Mrs. *Hull* to answer the legacy of that amount, and on the death of Mrs. *Hull* in *May*, 1854, her executors paid it into Court, under the provisions of the Trustee Relief Act (10 & 11 c. 96).

In *May*, 1855, some of the parties claiming to be entitled to the fund presented a petition, praying for an inquiry as to the persons entitled to a share of the fund and distribution thereof accordingly; and in *June*, 1855, an order was made directing inquiries.

The Chief Clerk certified who were the children of the persons named. He found that the testator had a second sister, *Priscilla*, who had a son, *Henry Parry*, living at the death of Mrs. *Hull*; that Mrs. *Hull* had, besides those named in the will, another brother, *James*, and another sister, *Mary Wolverton*, who died leaving one child, namely, *Sarah Eccles Viner*.

1855.

*In re*  
HULL'S  
Estate.

The questions upon the construction of the will were, first, whether the objects of the testator's bounty took *per stirpes* or *per capita*, which point was not pressed; and, secondly, whether the general class was cut down by the particular description, enumerating some but omitting several.

Mr. *Elwin*, for the Petitioners, contended for the limited construction.

Mr. *Brooksbank*, for parties in the same interest.

Mr. *Selwyn*, for Mrs. *Viner*. The testator named *Ann Wolverton* in his will, but it is submitted he meant *Mary*; but, independently of that, Mrs. *Viner* is entitled to a share of this fund on the general ground, that where there is a gift to a class, and then particular individuals of the class are named, who do not compose all the class, still the whole class are nevertheless included; *Yeats v. Yeats* (a). Some of the class here are not named, but that does not exclude them; for if parties not named were excluded, it would have been unnecessary to except one of the nieces, which the testator does. Mrs. *Viner* is accordingly entitled to a share as one of a  
general

(a) 16 Beav. 170.

1855.

*In re*  
HULL'S  
Estate.

general class. *Humphreys v. Humphreys* (a) case the testator gave the residue among children, naming only six, and yet they all to MASTER of the ROLLS. Yes; and if in this testator had mentioned the number of the en and had then only named some of them, would be the same as there. The exception makes is the only thing in your favour.]

Mr. Blackmore, for *Henry Parry*, in the s rest as Mrs. *Viner*.

Mr. Jolliffe, for the executors of Mrs. *Hull* to *Morrison v. Martin* (b).

The MASTER of the ROLLS reserved judgment

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The MASTER of the ROLLS.

The question on this petition is, who are in the bequest contained in the testator's will, with these words :—[*His Honor stated the terms of* It appears that, besides the persons so mentioned in the testator's will, the testator had a sister, *Priscilla*, not mentioned in the will, who left a son, now living, *Henry Parry*; the testator's wife had also a sister, *Mary Wolcott*, who had left one child surviving her, while *Ann*, the testator's sister, left none. It is contended that the general gift "to all my nephews and nieces" extend to all the nephews and nieces of the testator and of his wife, and that it is not cut down by the enumeration. I am of opinion that the case does not apply to this case. No doubt, when

(a) 2 Cor, 185.

(b) 5 Hare,

clearly designates a class to take, any error he may make in the number of the persons comprised in the class is immaterial, and the Court will set it right. There are several cases, all of which establish that proposition; *Tomkins v. Tomkins* (a); *Gancy v. Hilbert* (b); *Morrison v. Martin* (c). In the last case, a testator gave 100*l.* to each of the two children of his two nephews; one had three and the other two, and the Court held, that each took 100*l.*, and that in fact 500*l.* was given, and not 200*l.* The bequest would have failed for uncertainty unless the whole class were included, for otherwise no one could ascertain which of the five were included. I proceeded on that ground in *Yeats v. Yeats* (d).

1855.

*In re  
HULL's  
Estate.*

That principle, however, does not apply, when the testator has himself distinctly designated and specified who are the persons to take. I know no cases which have extended such a clause, so as to include persons whom the testator has not included. [*His Honor next alluded to Humphreys v. Humphreys* (e).]

I think that the testator has himself here specified of whom the class is to consist, and that I cannot enlarge it. He has done so by the word "namely" in both cases, giving a distinct meaning to the class he meant to specify. This distinguishes the present from the other cases, and makes it a legacy only to the families he has enumerated. It may be, that for some reason I cannot ascertain, he did not consider the others to be his nephews and nieces, or he might not have been in the habit of including the other persons under that designation, but I cannot allow extrinsic evidence to be adduced in support

(a) Cited in 2 *Ves. sen.* 564  
and 3 *Atk.* 257.  
(b) 19 *Ves.* 125.

(c) 5 *Hare*, 507.  
(d) 16 *Beav.* 170.  
(e) 2 *Cor.* 185.

1855.

*In re*  
HULL'S  
Estate.

support of either proposition; yet this, if adduced, might shew what the testator intended; he has himself here stated of what the class is to consist, and I am of opinion that I cannot enlarge it.

The argument, that it was unnecessary to make the exception of the widow of *Philip Parry*, which, as it is justly contended, is an unnecessary exception, in the view I take of this case, does not appear to me to be sufficient to control the rest of the construction; and it is to be observed that he excepts her for the purpose of giving her a legacy.

I am of opinion that only the persons enumerated in this will can take, and will so declare accordingly.

1856.

LYNE v. LYNE.

March 15, 17.

In a suit for partition, the Plaintiff claimed as heir of a deceased tenant in common. The Defendant ignored the Plaintiff's title as heir, and, at the original hearing, an inquiry as to the fact was directed, which was found in

**ELIZABETH LYNE** and *Mary Reeve* were seised of some property, as tenants in common in fee. *Elizabeth Lyne* died in 1834, having devised her moiety to *Mary Reeve* for life, with remainder to *Edmund Ormond Lyne*. *Mary Reeve* died in 1837, intestate as to her real estate, and thereupon *Edmund Ormond Lyne* took possession of the whole of the property, as to one moiety under the will of *Elizabeth Lyne*, and as to the other as heir of *Mary Reeve*. He married the Defendant *Mary Lyne* in 1844, and, on that occasion, he settled

favour of the Plaintiff. Held, that the Defendant was not liable to pay the costs of the inquiry, except so far as they might have been increased by independent evidence adduced by the Defendant, in opposition to the Plaintiff's title.

On the cause coming on for further consideration, the Defendant, who was entitled to a moiety, insisted that she was purchaser for valuable consideration of the other moiety. Held, that although no such point had been raised by her answer, she was still entitled to make it available, and an inquiry was directed.

settled this property on her for life, and he died in 1851.

1856.

LYNE  
v.  
LYNE.

The Plaintiff, in 1854, filed this bill, alleging that he was the heir of *Mary Reeve*, and that *Edmund Ormond Lyne* was illegitimate, and praying a partition of the Property.

In her answer, *Mary Lyne* stated, that she could not say whether *Mary Reeve* did or did not leave the Plaintiff her heir at law, but that she had been informed and believed, that no registry could be found of the marriage of her grandfather.

She submitted that *Edmund Ormond Lyne*, on the decease of *Mary Reeve*, became entitled, not only under and by virtue of the will of the said *Elizabeth Lyne*, to one equal undivided moiety of the real estate, but also as heir of the said *Mary Reeve* to the other moiety thereof.

At the hearing, in *July*, 1855, an inquiry was directed as to who was the heir at law of *Mary Reeve* at her death, and it was found in favour of the Plaintiff. Upon the case coming on for further consideration, the Defendant *Mary Lyne* insisted, that under the marriage settlement, she was a purchaser for valuable consideration without notice. She had, however, raised no such point by her answer.

Mr. *Follett* and Mr. *W. W. Cooper*, for the Plaintiff, insisted, that the Defendant *Mary Lyne* ought to pay the costs of the inquiry, in which she had been unsuccessful.

*Hill*



1856.

*Hill v. Fulbrook* (a), and *Morris v. Timmins* (b),  
were cited.

LYNE  
v.  
LYNE.

Mr. *Lloyd* and Mr. *Woodroffe*, for *Mary Lyne*, argued, that it was necessary for the Plaintiff to make out his title, and pay his own costs up to the hearing; and secondly, that the Defendant, in such a suit as the present, was entitled, even now, to insist on any title she might have to the estate.

Mr. *R. Palmer* and Mr. *Graham Hastings*, for the executors of *Edmund Ormond Lyne*.

Mr. *Follett*, in reply.

The point of purchaser for valuable consideration without notice is not raised by the answer, and it cannot now be insisted on, having been passed over; secondly, it is an essential point to prove there was no notice.

*The MASTER of the ROLLS.* I will not finally dispose of this matter, but I have one or two observations to make respecting the decree to be made in this case. In the first place, I do not think that *Mary Lyne* ought to pay the costs of the Plaintiff of making out his title, for that was necessary, in any event, in a case of partition; but, I think, that, so far as the costs may have been increased by any act which she has done to dispute the Plaintiff's title, she ought to pay them. If she has brought forward substantive evidence to disprove the Plaintiff's title, then, I think, that having failed, she ought to bear the costs of that evidence; but I do not consider that the mere cross examination of the Plaintiff's witnesses would come within that rule.

In

(a) *Jacob*, 574.

(b) 1 *Beav.* 411.

In other respects there will, at all events, be the usual partition decree, whether it will be of the reversion or of the whole must depend upon this:—whether I direct an inquiry as to *Mary Lyne* being a purchaser for value without notice.

1856.

LYNE  
v.  
LYNE.

My strong impression is (notwithstanding great *laches*), that I ought not to preclude her from so doing. I will read the bill and answer before I finally dispose of the case. If I should allow her to prove that she is a purchaser for value without notice, then I am disposed to think, that I must throw the costs of that inquiry upon her, and that I must require, either an affidavit from her that she had no notice at all, or if the Plaintiff requires it, that she should present a petition and verify it by affidavit.

*The MASTER of the ROLLS.*

March 17.

I must give an opportunity to the widow to prove, if she thinks fit, that she is a purchaser for valuable consideration without notice.

I am desirous to do that in the least expensive manner possible, and perhaps the better mode will be, to furnish me with the evidence, instead of directing an inquiry or of putting the widow to present a petition. Of course the first step in the evidence will be for the widow to deny, positively, any notice whatever, with relation to the matter.

The form of inquiry will be this:—Inquire whether at the date of the indenture of settlement of the 17th day of July, 1844, *Mary Lyne* had notice that *Edmund Ormond Lyne* took the property in question, as heir at

1856.

LYNE

v.

LYNE.

law of *Mary Reeve*, and also that the said *Edmund Ormond Lyne* was illegitimate.

If she had notice of those two facts then, that would be notice of the infirmity of the title, and will prevent her from being a purchaser for valuable consideration without notice.

### HANBURY v. TYRELL.

Feb. 14, 15.

A father who had a power to appoint to his children and their issue born in his life, appointed 5,000*l.* to his daughter *O.*, who, on the next day, settled it on herself, her husband and her children generally.

Afterwards, by a deed, stating the appointment of 5,000*l.* to *O.*, for her separate use, with power to appoint it, the father appointed another fund to *O.* "and her children," "upon the trusts and subject to the same provisions as are hereinbefore declared of and concerning the sum of 5,000*l.* hereinbefore appointed unto and for the benefit of *O.*, or as near thereto as circumstances will admit." Held, that *O.* took the second fund for her separate use, with power to appoint it, and that the children took nothing.

Under a power to appoint a sum of money to a daughter, an appointment to her husband is invalid, *semble*.

BY a settlement made in *November*, 1814, a term was limited, in trust to raise, in the events which happened, 20,000*l.* for the younger children of *Peter Wright* and their "issue born in the lifetime of *Peter Wright*, as *Peter Wright* should appoint, and in default between his children who should attain twenty-one or marry with consent." The deed contained a hotchpot clause.

*Peter Wright* died in 1851, he had four younger children, viz., *Elizabeth*, *Harriet*, *Olympia* and *Mary*.

*Peter Wright*, by deed poll, dated the 22nd of *February*, 1836, appointed 5,000*l.* to his daughter *Olympia Hanbury*, for her separate use, with power to appoint it. On the next day (the 23rd *February*) she appointed 1,000*l.* to her husband, and on the day following (24th *February*) she appointed 4,000*l.* to trustees, upon trust, during her marriage, to pay her 100*l.* a year, for her separate use, without power of anticipation, and subject thereto, upon trust for her husband and herself successively

sively for life, and after the death of the survivor, upon certain trusts for their children.

1856.

HANBURY  
v.  
TYRELL.

*Peter Wright* also made appointments of 5,000*l.* each to his two daughters, *Elizabeth* and *Harriett*.

*Peter Wright*, by deed poll, dated the 22nd of *November*, 1842, (after reciting that he had, by certain deeds, appointed 5,000*l.* each to his daughters, *Elizabeth* and *Harriett*, "and also the sum of 5,000*l.* in favour of his daughter *Olympia Hanbury*,") appointed the remaining 5,000*l.* upon trust for his daughter *Mary* for life, and after her decease he appointed one-third of that fund to his daughter *Elizabeth*, for her absolute use and benefit, one other third to his daughter *Harriett* and the remaining third thereof unto "*Olympia*, the wife of *Richard Hanbury*, and her children, upon the trusts and subject to the same provisions as are *hereinbefore declared* of and concerning the said sum of 5,000*l.* *hereinbefore* appointed unto or for the benefit of the said *Olympia*, the wife of *Richard Hanbury*, or as near thereto as the nature of circumstances will admit."

The daughter *Mary* died in 1854, without having been married, and *Olympia Hanbury* and her committee, by this bill, now claimed to be entitled, absolutely, to the one-third of the 5,000*l.* appointed by the deed of 1842.

Mr. *R. Palmer* and Mr. *Elderton* for *Olympia Hanbury*. In order to give effect to the deed of 1842 the words "her children" must be rejected; the "trusts" and "provisions *hereinbefore declared*" must refer to those contained in the deed of the 22nd of *February*, 1836, by which the 5,000*l.* was appointed to *Olympia* for her separate use, with a power of appointment of it.

1856.  
  
 HANBURY  
 v.  
 TYRELL.

Her father was no party to the subsequent deeds of the 23rd and 24th of *February*, and he had no power to appoint to her husband, or to any of her children, except those born in his lifetime, and therefore any appointment to Mr. *Hanbury* or to the children, generally would be void. If the sentence stopped at the word "children" the mother and children would take as joint-tenants, but then, again, the appointment would be void. The words of reference control the words of description, and to effect the intention the words "and her children" must be rejected, and then *Olympia* will take absolutely.

Mr. *Roupell* and Mr. *Joshua Williams*, for the trustees.

Mr. *C. Locock Webb*, for a child of the Plaintiff and a trustee of the deed of 24th *February*, 1836. Effect must be given to the expression "and her children"; they cannot be struck out of the instrument. Either the sentence "upon the trusts" must be disregarded or it must be read with reference to the deed of the 24th of *February*, 1836. In the first case, the children will take with the mother, as joint-tenants, and, in the second, they will be entitled in remainder. He cited, as to the admissibility of extrinsic evidence, *Colpoys v. Colpoys* (a); *Smith v. Doe* d. Earl of *Jersey* (b); and, as to the ambiguity, *Langston v. Langston* (c).

Mr. *Forster*, for two other children of the Plaintiff. The three deeds of the 22nd 23rd and 24th of *February*, 1836, were parts of one and the same transaction, and must, in substance, be regarded as contemporaneous.

(a) *Jacob*, 451.  
 (b) 2 *Brod. & B* 553.

(c) 2 *Cl. & Fin.* 194.

neous. The father refers to the trusts declared by these deeds, and he evidently intends that they shall govern the devolution of the one-third of the 5,000*l.* appointed by him in 1842. The appointment to the husband is valid, for it gives him no more than he would be entitled under his marital right; *Hewitt v. Dacre* (a); *Bristow v. Warde* (b). Nor is the gift to the children invalid, though it is not restricted to those born in the life of *Peter Wright*; to provide against any such difficulty, the appointor says, "or as near hereto as the nature of the circumstances will admit." The Court, therefore, in directing the performance of the trust, has power to modify the expressions, and limit the operation of the appointment to that class of children which come within the terms of the power, so as to make it valid. At all events, the appointment is only void for the excess; *Crompe v. Barrow* (c).

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There are two alternatives, either to leave out the word "hereinbefore," and then the sentence will run thus: to *Olympia* and her children, upon the trusts declared of the sum of 5,000*l.*, or as near thereto, &c., that is, "upon the subsisting trusts;" or there is an executory trust for *Olympia* and her children, giving her life estate with remainder to her children; *Morse v. Morse* (d); *Crockett v. Crockett* (e); *Cutor v. Cator* (f).

### The MASTER of the ROLLS.

Feb. 15.

I have had an opportunity of looking at this deed since the case was argued yesterday. It undoubtedly appears to be very informal, and I can see no other means of construing it, where there is a contradiction between

(a) 2 *Keen*, 622.(b) 2 *Ves. jun.* 336.(c) 4 *Ves.* 681.(d) 2 *Sim.* 485.(e) 2 *Phill.* 553.(f) 14 *Beav.* 463.

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between the two branches of the sentence, than by giving effect to that, which is the most obvious meaning of the appointor, and which alone can make the deed operative. He directs one-third share shall go "unto *Olympia*, the wife of *Richard Hanbury*, and her children, upon the trusts and subject to the same provisions as are hereinbefore declared of and concerning the said sum of 5,000*l.* thereinbefore appointed, unto and for the benefit of *Olympia*, the wife of *Richard Hanbury*, or as near thereto as the circumstances will admit." As was very justly observed, on referring to the previous parts of the deed, there are no "provisions declared of and concerning the sum of 5,000*l.*" And although this deed also says, "thereinbefore appointed unto and for the benefit" of *Olympia Hanbury*, there is no 5,000*l.* appointed by this deed, and if you take the words literally, it is obvious, that it cannot be so treated. Therefore, all I can do, is this:—I must, in this sentence "hereinbefore declared of and concerning the sum of 5,000*l.* hereinbefore appointed," put in the words "stated or mentioned to have been," and read it, hereinbefore "stated" or "mentioned" to have been declared of and concerning the sum of 5,000*l.*, hereinbefore mentioned or recited to have been appointed unto *Olympia* the wife of *Richard Hanbury*. On referring to the previous part of the deed, I do find a recital, in which he says, that he had by a deed or instrument, appointed 5,000*l.* to the wife of Mr. *Hanbury*. Then upon referring to the deed by which he did so appoint it, I find he appointed the sum to her for her separate use, she being then a married woman, with a power of disposing of it by deed or will.

Now, it is no great strain or latitude of construction, instead of "hereinbefore declared" and "hereinbefore appointed," which, taken literally, have no meaning, say, "hereinbefore recited to have been declared," "hereinbefore

"hereinbefore recited to have been appointed," which would make the thing plain. I find a distinct reference to a deed, which does give 5,000*l.* to the Plaintiff on certain trusts, which trusts are for her separate use, with a power to dispose of it by deed or will.

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But this, undoubtedly, is inconsistent with the word "children," because that deed does not give any benefit to her children. What am I to do with this word? It is contended, that I am to say, the introduction of the word "children," must mean this: upon the same trusts and subject to the same provisions, not as hereinbefore declared of and concerning the sum of 5,000*l.*, or recited to have been declared, that is, not to the same trusts as were appointed by the settlor, which are for the benefit of *Olympia Hanbury*, but upon the trusts subsequently declared by herself, not of the 5,000*l.*, but of part of it, for the benefit of herself, her husband and children. It is quite clear, that that would be void, because the husband was certainly no object of the power, and certainly the children who might be born after the death of *Peter Wright* were no objects of the power, and they not being objects of the power, she could not appoint to them. If I treat this as a mere appointment under the deed to the wife of *Richard Hanbury* and her children, I must strike out all the subsequent words of the same trust, which will be much stronger than to strike out the words "her children," for, having done the former, I make the appointment in part void, because it includes persons not objects of the power. The deed was prepared either with great haste or great negligence, and the only intelligible construction is to say: that this one-third is given to *Olympia*, upon the same trusts and subject to the same provisions, as are contained in the deed by which *Peter Wright* appointed the 5,000*l.* for the



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the benefit of Mrs. *Hanbury*. That is the real meaning of it, and on referring to that deed, you find that it is given to her for her separate use, with a power to dispose of it by deed or will, and in my opinion, that is the true construction of this settlement, and I will make a declaration to that effect.

## WESTCAR v. WESTCAR.

Jan. 15, 16.

Construction of a gift, pending a contingency, to the person for the time being entitled in immediate expectancy.

Real and personal property were given to the eldest son of *A.* who should be living at his decease and attain twenty-one. The income, after twenty-one years' accumulation, was given "to the person for the time being entitled in immediate expectancy" to the property. At the end of

twenty-one years, *A.* was living and had children, who were all minors. Held, that the eldest minor was entitled to the income until *A.*'s death.

Personal estate was given upon a contingency, and the "income" was to accumulate in the meanwhile as long as lawful. There was a proviso, that subject thereto, the "income" was to be paid to the person "entitled in immediate expectancy." The rents of the real estate were then given upon the same trusts as had been declared concerning the "residuary personal estate," and upon the personal estate becoming vested, to convey the real estate to the same person. Held, that all the trusts of the personal estate were applicable to the real estate, and that the person entitled in immediate expectancy to the income of the personal estate was also entitled to the rents of the real estate.

THE testator, by his will, made in 1832, bequeathed his personal estates to trustees, on trust, to pay his nephew, *Henry Westcar*, an annuity of 1,000*l.* a year for life, and, subject thereto, in trust for the eldest or only son of *Henry Westcar*, who should be living at his decease and who should then have attained the age of twenty-one years, and for his executors, administrators and assigns absolutely; and if no son of the testator's said nephew, living at the period aforesaid, should then have attained the age of twenty-one years, then upon trust for such son of the Defendant, *Henry Westcar*, living as aforesaid as should first or alone attain the age of twenty-one years, and for his executors, administrators and assigns absolutely; and if there should be no son of the said *Henry Westcar* who should become absolutely entitled to the said trust funds, under the trusts thereinbefore declared thereof, then upon the trusts therein mentioned.

The

The will contained a proviso, by which the testator directed, that until the trust moneys should become absolutely vested in some person, the "dividends, interest and some of the same," or so much as remains after paying an annuity, should be accumulated and held upon the trusts thereinbefore declared of the principal trust moneys. Subject to that provision (so long as the same could fully operate) he directed, that the income of the said trust moneys and of the accumulations should be paid "to the person for the time being entitled, in immediate expectancy," to the principal of the said stocks, bonds and securities, and be paid to him or her accordingly.

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The testator devised his real estate to the same trustees, upon trust, to add the rents and profits to and in accumulation of the testator's residuary personal estate, to be held upon the same trusts as were thereinbefore declared of and concerning the said residuary personal estate; and when any person should have become entitled to the vested and absolute interest in the testator's said residuary personal estate, to convey the real estates into such person and his heirs.

The testator died on the 24th of April, 1833, and the period of twenty-one years from the testator's death expired on the 24th of April, 1854.

Henry Westcar had two children, viz. the Plaintiff, Henry, who was born in February, 1839, and the Defendant, Elizabeth. The surplus income exceeded 8,400*l.* a year.

The Plaintiff insisted, that he was, under the trusts of the will, "the person for the time being entitled in immediate expectancy" to the principal of the said trust funds,

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funds, and as such entitled to the income thereof and of the real estate.

Mr. *R. Palmer* and Mr. *Shapter*, for the Plaintiff.

Mr. *Selwyn*, for the Plaintiff's sister.

Mr. *Lloyd* and Mr. *C. Hall*, for one of the heirs and next of kin, claimed the intermediate income of the real and personal estate. They argued that no individual could be said to be the person for the time being entitled in immediate expectancy who had neither survived *Henry Westcar* or attained twenty-one. Secondly, that the future rents were undisposed of and passed to the heirs; for the trusts of the rents were by the will expressed to be those only of "the residuary personal estate," and that, therefore, the trust for the person entitled in expectancy, which related to the "dividend interest and income" of the residuary personal estate and not to the "residuary personal estate" were inapplicable to the rents of the real estate. In fact, that the trusts of the real estate fell short of all those declared respecting the personal estate.

Mr. *Follett*, for one of the co-heiresses.

Mr. *Osborne*, for representatives of the testator's daughter.

Mr. *Roupell* and Mr. *Nelson*, for other parties.

*The MASTER of the ROLLS.* I will read the will.

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Jan. 16. *The MASTER of the ROLLS.* I have looked at this case and I think there is no reasonable doubt respecting it  
 The

**T**he only point on which I wished to read the will, was relative to the trusts of the real estate. The rents are given upon the same trusts as the residuary personal estate, the income of which, when the law prevents the further accumulation of it, is to go "to the person entitled for the time being in immediate expectancy." If the same trusts apply to the real estate, why stop short at this proviso. I think all the trusts of the personal estates, as well the last as the first, are applicable to the rents, which must now go to the person entitled in immediate expectancy.

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**I** think the person entitled in immediate expectancy is he, who, if he lives long enough, will be first entitled to have the possession of the property.

HOWELL v. KIGHTLEY.

Jan. 19.  
Feb. 9.

**S**OME leaseholds were held subject to a covenant on the part of the lessee to insure, with a proviso of re-entry upon default being made in keeping them insured. The property was sold on the 24th September, 1855, under the Court, subject to special conditions of sale, the eighth of which, so far as material, was as follows:—"The title to the property will commence with the lease under which the same is now held, which may be inspected, &c., and the title, as deduced from this lease, shall be accepted without anything further, and without production or investigation of the lessor's title; and the property being held, as stated in the particulars, at a pepper-corn rent, the possession under the lease shall be deemed down to the contract, but not breaches of covenant subsequently committed by the vendor, by which a forfeiture was incurred.

Under special conditions, on the sale of leaseholds, it was provided, "that possession should be deemed conclusive evidence of the due performance or sufficient waiver of any breach in the covenants in the lease, up to the completion of the sale." Held, that this would cover all breaches

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*deemed conclusive evidence of the due performance, or sufficient waiver, of any breach of the covenants in the lease up to the completion of this sale."*

A reference had been made to chambers, to ascertain whether a good title could be made; and the consideration of it was adjourned into Court, on the following point:—It was insisted by the purchaser, that there had been a breach of covenant committed prior to the date of the contract, by allowing a period between the 29th of September, 1854, and the 21st of May 1855, to elapse, during which the premises had not been insured. Assuming this (for the purposes of the decision) to be true, the purchaser insisted, that a good title was not shewn, and that he was not bound to complete a contract which might give him nothing for his purchase-money.

Mr. *R. Palmer* and Mr. *Rogers*, for the vendor. The conditions of sale are express, that the possession shall be conclusive evidence, not only of the due performance of the covenants, but of the sufficient waiver of any breach of them, up to the completion. This stipulation prohibits the purchaser taking any such objection as the present. The difficulties in shewing the due performance of covenants would render it impossible to sell leaseholds, but for such special conditions of sale.

Mr. *Follett* and Mr. *Grove*, for the purchaser. It is contrary to all the rules which prevail upon the subject of specific performance to force a purchaser to accept a title which is ascertained to be defective. In *Warren v. Richardson* (a), a purchaser had waived all objection

(a) *Younge*, 1.

to the title, but it afterwards incidentally appearing, that the title was bad, the Court would not decree a specific performance against him. If a person intends selling a bad title, the contract must be express, otherwise it is a mere trap, which this Court will never countenance, for there can be no waiver of a forfeiture which is fraudulently concealed. The Court will in no case compel a person to buy that which the day after he may be deprived of by title paramount, the more especially when the Court itself is the vendor.

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*The MASTER of the ROLLS.*

I will state how this case strikes me. I think the eighth condition is notice to the purchasers, that there may be breaches of covenant, and that they must be taken to be waived. I do not say, what would be the effect, if it were proved that the landlord did not intend to waive the forfeiture, but to enforce it; the case might then be different on this condition.

I am of opinion, that all the covenants are to be deemed to have been performed or breaches waived down to the contract. With respect to any subsequent breach, if there should be any, I shall reserve my opinion, and I will allow further evidence to be produced on the subject.

I guard myself from saying, what would be the result, if the landlord, being applied to, had said to the purchaser, "I will evict you as soon as you have completed your purchase."

Further evidence was then adduced, and it was shown, that, since the contract, there had been a default in keeping up the insurance.

The

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The sale took place on the 24th of *September* the premium on the policy became due on the *September*, 1855, and, allowing the fifteen days the time of payment expired on the 14th of *October* and nothing was paid until the 24th of *October*. A receipt was then given by the insurance office pressed to be for a payment made on the 29th *September*, 1855, and the new policy was dated the *November*, 1855. The case was again brought to Court.

Mr. *Follett* and Mr. *Grove*, for the purchaser, has been a voluntary forfeiture of the lease since the contract. If the house had been burnt down on the 14th of *October* and before the policy had been renewed nothing could have been recovered. There is, therefore, a period uncovered by the insurance, which renders the lease liable to be forfeited. The purchaser is a bona fide purchaser, but he objects to a forfeited title which secures him nothing.

Mr. *R. Palmer* and Mr. *Rogers*, *contra*, contend first, that there was not sufficient proof of the necessity to keep up the insurance, and, secondly, that the condition of sale provided for this very case, that the purchaser had contracted that all forfeitures were assumed to be waived until the completion, unless the contrary was shewn. That there had been no such case, and that the universal practice in all sales of leaseholds was to make special stipulations to the present, for otherwise it would be impossible to prove that no forfeiture had taken place. They contend that the conditions had been framed in "a candid manner."

*The MASTER of the ROLLS.*

There are two questions in this case, first,

ere is any defect in the title, and, secondly, if there , whether it is cured by the conditions of sale. With spect to the first point, the question is, whether the dence establishes, that for a period of eight or nine ys, between the fourteenth and twenty-fourth of :tober, the property was exposed to risk from not ing insured, and I think it does. It is true, that the urance company would now be estopped from al- ging anything contrary to the receipt, but that would t affect the landlord, who, upon proving the for- ture, would be at liberty to eject the tenant. I am, erefore, of opinion, that there was a distinct breach of e covenant subsequent to the contract.

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The next question arises on the conditions of sale. r. Rogers says, that a great quantity of leasehold roperty is daily sold subject to the same conditions of le. That may be so, and I have considered this con- tion good for all breaches up to the date of the con- act, and, on a former occasion, I decided, that, though rring a period after the lease was granted and before ie contract, the property was not insured, the condition e sale was sufficient to cover the objection.

But the present question is this:—whether that con- tion is sufficient to cover breaches of covenant com- mitted by the vendor himself subsequent to the contract ad before the completion of the sale.

The condition says, that possession shall be a sufficient waiver; but what waiver could there be when the con- tract was in *feri*. I think this Court would not permit a ondition which cures all breaches up to the agreement, lso to cure the effect of the vendor's subsequent acts of orfeiture. It might be a case of voluntary waste, as by utting timber after the contract. It is said, that nothing but



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but fraud will vary the contract, but, in this case the purchaser, by the inadvertence or neglect of the vendor, may lose the property, and the effect is, that there is a flaw in the title which the landlord may take advantage of, created by the vendor after the agreement was entered into.

I think that this gave to the purchaser the power to refuse to complete, and although the vendor has inserted in his condition that possession shall be deemed a waiver of all breaches "up to the completion of the sale," I think that it will not justify him in claiming a forfeiture after the contract, entitling the landlord to enter, though the condition of sale may be sufficient to cure the defect up to the contract.

In my opinion this condition did not cover breaches of covenant committed subsequent to the contract, though the words "up to the completion of the sale" are used.

I cannot force this property on the purchaser.

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## WRIGLEY v. SYKES.

**T**HE testator, *Jonathan Wrigley*, was seised and possessed of some freeholds and leaseholds which, in 1821, he had mortgaged for 4,500*l*.

By his will, dated in *January*, 1822, he "*ordered all his just debts*, funeral expenses, and the charges of the probate of his will, and the several legacies thereafter bequeathed, *to be paid* and discharged out of his real and personal estate." He then gave his wife, during her life, the use of certain household goods, &c., and a freehold cottage, so long as she chose to reside therein, and after the determination of his wife's estate therein, he gave and bequeathed the same to his five sons, *John, James, Jonathan, George* and *Thomas*, equally in fee. The testator then gave his wife an annuity of 50*l*., for her life, in lieu of dower, and to his daughter *Sarah*, an annuity of 40*l*., for her life, to be issuing and payable out of, and he thereby charged therewith, all his freeholds and leaseholds (except that given to his wife); and after bequeathing two legacies of 400*l*. and 600*l*., which he thereby charged upon all his real and personal estate, the testator gave and devised all and singular his freehold messuages to *Lees* and *Bradbury*, for

Jan. 21, 22.

A mere desire expressed by a testator in his will that his debts shall be paid, creates a charge on his real estate for their payment.

A general charge of debts on the real estate gives to the executors an implied power of sale.

Distinction between the expression of a desire that all debts shall be paid, followed by a gift of a particular estate for their payment, and a general charge of the real estate with the debts, followed by a particular provision for their payment. In the former, the general charge

is qualified and limited to the particular estate, but in the latter it is not. A "testator" ordered his debts and legacies "to be paid and discharged out of his real and personal estate." He subsequently devised his real estates to trustees for five hundred years, and subject thereto, to his five sons as tenants in common in fee, "upon condition" that they should pay, in equal shares, certain legacies and his debts; and in case any son should neglect to pay his portion, the trustees of the term were, out of the rents of his share, to raise the amount. He appointed the five sons executors. Thirty-three years after the death of the testator, the surviving executors sold the estate, as they alleged, to pay the debts. The Court held, that they had power to sell, and decreed a specific performance against the purchaser.

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for a term of five hundred years, upon the trusts therein after mentioned; and he gave all his real and personal estate (subject to the term of five hundred years) to his said five sons, their heirs, &c., as tenants in common, upon condition that they should pay, in equal shares, the two legacies of 400*l.* and 600*l.*, and the two annuities of 50*l.* and 40*l.*, and also all his mortgage and other debts, and upon further condition, as to the gift to *James*, that he should pay to *John* the sum of 600*l.* within six years after the testator's decease, with interest. The testator declared the trusts of the five hundred years' term to be, that if any of his sons should, for the space of thirty days after demand thereof should be made, refuse or neglect to pay his or their proportion or share of the legacies of 400*l.* and 600*l.*, and the annuities of 50*l.* and 40*l.*, and the mortgage and other debts, or if *James* should refuse to pay the 600*l.* to *John*, the trustees should, out of the rents of the share of such sons, raise and levy such sums unpaid, and all costs. The testator directed that the receipts of the trustees should be sufficient discharges, and he appointed his sons executors of his will.

The testator died in *February*, 1822, and all his sons, except *James*, proved his will.

The testator's personal estate was insufficient for payment of his debts. His sons *John*, *James* and *Thomas* had died, leaving the Plaintiffs, *Jonathan* and *George*, the surviving executors.

The sum of 3,500*l.* remained due upon the mortgage, and in order to pay it, and other debts, the Plaintiffs, in *December*, 1853, entered into an agreement with the Defendant, *Benjamin Sykes*, for the sale of part of the freehold property, for 4,100*l.* The mortgagee was will ing

willing to concur, but the purchaser insisted, that the surviving executors had no power to sell, and were unable to make a good title. The vendors thereupon filed the present bill for the specific performance of the contract.

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Mr. R. Palmer and Mr. Mackeson, for the Plaintiffs.

First. The executors had an implied power of sale over the estate. It was held, so far back as the 15 *Hen.* 7, that "if a man makes his will, that his land which his feoffees have shall be sold and aliened, and does not say by whom, there his executors shall alien that, and not the feoffees, per *Rede, Tremaille, et Fowik. Fineux* said nothing to this this day; but the day before, he in a manner affirmed this. *Conisby* said, that the feoffees shall alien this, for they have the confidence placed in them, &c. But this was denied, for executors have much greater confidence placed in them than the feoffees have, for the money to arise by the sale of the executors shall be assets in their hands, and therefore they shall sell." 2 *Sugd. Pow.* 6th ed. (a).

The authorities from that time to the present bear out the same doctrine. Thus it is stated in *Bentham v. Wiltshire* (b), "To enable executors to sell, the power must either be expressly given to them, or necessarily to be implied, from the produce being to pass through their hands in the execution of their office, as in payment of debts and legacies." Again, the general rule is stated in *Tylden v. Hyde* (c) thus:—"Where there is a general direction to sell, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their

(a) Page 538.

(b) 4 *Mad.* 49.(c) 2 *Sim. & St.* 241.

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their office, a power to sell will be implied to ~~the~~ the executors." In addition to these reasons for the rule, it is evident that the executor alone can know whether the debts are or are not paid, whether there is an ~~any~~ set-off against the demand, or whether it is barred by the Statute of Limitations, for he possesses all ~~the~~ the documents; and if it be clear that the money is to ~~be~~ raised, who can be more proper to raise it than the persons who have to apply the fund when raised, *Robinson v. Lowwater* (a). In the present case, the blending of the real and personal estate, together, is an additional reason for implying in the executor (who necessarily must have the control over the personal estate), ~~the~~ the power to raise, by sale of the real estate, the necessary funds to pay the debts; *Tylden v. Hyde* (b), *Gosling v. Carter* (c).

It will be said, that there is a distinction between a direction to sell the real estate for payment of debts ~~and~~ and a charge, or a simple direction that they should be paid; but none such exists. In *Elliot v. Merryman* (d) ~~the~~ the expression used was, "my will is, that all my debts be paid; and I do charge all my lands with the payment thereof." "Item: I give all my real and personal estate to — *Goodwin*, to hold to him, his heirs, executors, administrators and assigns, chargeable, nevertheless, with the payment of all my debts and legacies;" as to this ~~the~~ the Master of the Rolls (Sir *Joseph Jekyll*) said, "'Tis indeed true, that these words do not amount to a devise of the lands to be sold for the payment of the debts, and they only import a charge upon them for that purpose. However, this is such a devise as is within the meaning of the proviso of the statute of Fraudulent ~~De~~   
vises,

(a) 5 De G., M. & G. 277.  
 (b) 2 Sim. & St. 238.

(c) 1 Coll. 644.  
 (d) *Barnardiston*, 78.

vises, and does interrupt the descent to the heir at law." He afterwards adds (a), "The present case, indeed, does not fall within either of these rules, because here lands are not given to be sold for the payment of debts, but are only charged with such payment. However, the question is, whether that circumstance makes any difference? And his Honor was of opinion that it did not." Lord Langdale, in *Shaw v. Borrer* (b), expressed a similar opinion: he says, "And on the whole, considering that the charge creates or constitutes a trust for the payment of debts, or, as Lord Eldon in one place (adopting the language of Lord Thurlow) expressed it, that 'a charge is a devise of the estate in substance and effect *pro tanto* to pay the debts,' " &c. &c.

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Lord Cottenham approved of *Shaw v. Borrer* in *Ball v. Harris* (c), there the testator had "directed all his just debts, &c. to be paid" (d); and Lord Cottenham says (e), "In support of the appeal, it was not disputed that the directions in the will constituted a charge of the debts upon the real estate. But it was contended, first, that such a charge did not give a power to sell," &c. &c. "The affirmative of the first proposition was acted upon by the Master of the Rolls in *Shaw v. Borrer* (f), and the real question is, was that decision right? I have carefully considered the judgment of the Master of the Rolls upon this point, and I entirely concur with him upon it. The point, indeed, has been long established. It arose directly in *Elliot v. Merryman* (g), and, as there laid down, has been recognized in the several cases referred to by the Master of the Rolls, to which may be added the opinion of Lord Thurlow and Lord Eldon in

(a) Page 81.

(b) 1 Keen, 577.


(c) 4 Myl. & Cr. 264.

(d) 8 Sim. 485.

(e) 4 Myl. & Cr. 266.

(f) 1 Keen, 559.

(g) Barnardiston, 78.

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in *Bailey v. Ekins* (a), and *Dolton v. Hewen* (b); for although the point in some of those cases was, whether the purchaser was bound to see to the application of the purchase-money, the decision, that he was not, assume that the sale was authorized by the charge in the will of the testator, that the debts were to be paid out of the debts upon the estate; that is, that the charge of the debts upon the estate was equivalent to a trust to sell for the payment of them." The Vice-Chancellor *Knigh Bruce*, in *Gosling v. Carter* (c), entertained a similar opinion; and it is to be observed, that in *Shaw v. Borrer*, and *Gosling v. Carter*, the testator, as in the present case, "directed" payment of his debts.

Although in *Doe d. Jones v. Hughes* (d), where the testator charged his real estate with his debts, &c., and appointed his widow executrix, it was held, that a mere charge of debts, &c. gives no implied power of sale to an executor, and that she had no authority to sell his *Bala House* for payment of his debts; yet in *Robinson v. Lowater* (e), this Court having found "it difficult to reconcile the decision in that case with the numerous authorities to be found on this subject in Chancery," came to an opposite conclusion, and the decision was affirmed on appeal (f). In *Stroughill v. Anstey* (g) Lord *St. Leonards* speaks of *Ball v. Harris* thus (h): "This case, therefore, introduces the very proper distinction, that where there is a general trust without a mode of raising charges, or where, by force of the charge itself, there is an implied trust to raise it, and the estate itself is disposed of *subject to that obligation (which must be a power to sell)*, then the charge may be raised by mortgage as well as by sale." On this point they all refer -

(a) 7 Ves. 319; see p. 323.  
 (b) 6 Mad. 9.  
 (c) 1 Coll. 644.  
 (d) 6 Erch. Rep. 223.

(e) 17 Beav. 592.  
 (f) 5 De G., M. & G. 27.  
 (g) 1 De G., M. & G. 63.  
 (h) Page 647.

ferred to 17 *Jur. part 2 (a)*, and see 2 *Jur. (N. S.) part 2 (b)*.

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Secondly, the implied power is not rebutted by the subsequent devise or by the term of 500 years created for securing payment of the debts and other payments, and which was intended for mere family purposes. The charge of debts is paramount to all the subsequent devises and affects *all* the real estate, while the term does not include *Deanhead*, which was devised to the testator's wife for life. *Shaw v. Borrer (c)*, and *Jenkins v. Hiles (d)*.

Mr. *Bagshawe* and Mr. *Smale, contrà*. Where a mere charge is created on an estate, no power of sale is to be implied in any person; the owner takes the estate subject to the charge and to the ordinary remedies for raising it; but it would be productive of the greatest injustice to allow a man's estate to be sold behind his back under some implied authority. In the case of *Doe d. Jones v. Hughes* the Court of Exchequer were unanimous in holding, that a mere charge of debts on an estate does not authorize the executor to sell another man's estate. The cases cited in which a sale was directed do not apply; but even where a sale is directed, without saying by whom, a power of sale in the executors is not to be implied; *Curtis v. Fulbrook (e)*; *Bentham v. Wiltshire (f)*. "Before an implication is raised there must be an absence of express devise, and in opposition to a devise it can never be raised;" *Patton v. Randall (g)*, and here there is a devise to the five sons.

Secondly,

(a) Page 258.

(b) Page 68.

(c) 1 *Keen*, 576.

(d) 6 *Ves.* 654, n.

(e) 8 *Hare*, 25, corrected, 278.

(f) 4 *Mad.* 49.

(g) 1 *Jac. & W.* 196.



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Secondly, in this case, no power of sale in the executor can be implied, for the testator has pointed out the mode by which the debts and legacies are to be paid. The devise is to the five sons, on condition of their paying the debts in equal proportions, besides which, a term is limited for securing the due performance of the condition, and the payment of the debts and legacies, by raising the deficiency out of the rents. Even if the first part of the will gave the executors an implied power to sell the subsequent express trust supersedes it. [On this point the Court referred to *Ellison v. Airey* (a), and *Crallan v. Oulton* (b).] The sale is made by trustees, and they are bound to see that the intention of the testator is carried into effect; not by selling the whole, but by making the share of each son bear its proportion of the burden, by a contribution.

Thirdly. The testator died in 1822, and even if the executors originally possessed the power they cannot now compel a purchaser, after thirty-three years' delay, to take such a title. Persons who deal with trustees raising money at a considerable distance of time, and without apparent reason for so doing, are under an obligation to inquire and see that no breach of trust is being committed; *Stroughill v. Anstey* (c). Lord St. Leonards says:—"I will only add, in regard to the general question of distance of time, that people who deal with trustees raising money at a considerable distance of time and without an apparent reason for so doing, must be considered as under some obligation to inquire and to look fairly at what they are about. I do not thus mean to incumber or to lessen the security of purchasers."

(a) 2 Ves. sen. 568.

(b) 3 Beav. 8.

(c) 1 De G., M. &amp; G. p. 654.

Chasers or mortgagees under trusts; but if, for a great number of years, a trust, such as that here, remains unperformed, and parties are found in possession and receipt of the rents of the trust property, and then an application is made of it without their concurrence by the trustees, it may place those who deal with the trustees in a situation of having it established that there was a breach of trust, of which they ought to have taken notice."

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Fourthly. This Court will never compel a purchaser to take a doubtful title, or to purchase a law suit. Here there is a conflict between two Courts, upon the very point on which the validity of the title depends, and when the purchaser has been compelled to complete his contract by this Court and has paid his purchase-money, he knows, from the reported decision of the Court of Exchequer, that upon an ejectment, he will be turned out of possession.

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I cannot, consistently with the view I have always taken of these cases, and which I expressed in the case of *Robinson v. Lowater*, refuse to give the Plaintiff a decree. I take the distinction, in these cases, and which two cases before me, with many others illustrate, to be this:—in the first place, when a testator expresses a desire that his debts shall be paid, the Court considers, that every portion of his property available for that purpose shall be applied in payment of his debts. Consequently, in the older cases, the mere expression of a desire that his debts should be paid made his real estates liable for their payment. But there are two cases, before the statute making real estate assets for payment of simple contract debts, in which this has occurred:—

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occurred :—there has been a mere expression, on the part of the testator, of a desire that his debts shall be paid, followed by a gift, for that purpose, of a specific property which, by the existing law, was not liable for their payment. Courts of Equity, in construing such a will, have treated the expression of a desire that his debts shall be paid, as qualified by the subsequent creation of a particular fund, in addition to the personal estate, for the purpose of such payment. But if the testator begins his will with an express charge of all his debts upon his real estate, the Court holds, that this express and distinct devise or direction that all his real estate shall be liable, is not to be cut down, unless it finds some words expressly stating, that those words are not to operate, or something contradictory or repugnant to them, and, therefore, that the subsequent creation of a fund for the payment of these debts does not supersede the prior general direction. That is the general view I take of this case, and I will refer to two cases, and no doubt there are a great many others, which express that pretty clearly. One is the case of *Palmer v. Graves* (a). The Court held, in that case, that the testator had not made a general charge for the payment of his debts out of his real estate, because, if he had, the subsequent direction would have been unnecessary, and he had gone on, and pointed out what he intended. But I apprehend the result would have been different if there had been an express general charge of his real estate for payment of his debts.

The other case that I refer to is a case of *Coxe v. Basset* (b). There was a general charge of debts and legacies upon all the real estate, with a subsequent power to sell

(a) 1 *Keen*, 545.

(b) 3 *Ves.* 155.

particular estate for their payment, and it was held, that the general charge upon the testator's real estate remained, although there was a subsequent devise of a particular estate, with a direct power that it should be sold and applied in payment of debts. I apprehend that the same principle will be found to pervade the many other cases upon the subject; it is the view I have taken of these cases, and it appears to me to be consistent with all the cases that have been cited, and very much the view expressed by Lord Justice *Knight Bruce* and by Lord *St. Leonards* in the case of *Stroughill v. Anstey(a)*. This is the general view that I take of this case.

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I now come to observe upon this particular will, and I am struck with the peculiar character of the term which is created, which makes me think that it rather strengthens the view which I take of this case; viz., that it was not intended to control the general charge for payment of debts which is given by his will. The testator directs "all his just debts, funeral expenses, and the charges of probate and legacies to be paid out of his real and personal estate." You cannot have a more comprehensive trust; it includes all his property. [*His Honor here stated the rest of the will, which it is unnecessary to repeat.*] The object of the term of 500 years was this:—Suppose a division of the estates had taken place amongst the devisees, by voluntary or compulsory partition, before all the debts had been ascertained; and that it became afterwards necessary to sell part of the estates belonging to one of the devisees for the purpose of paying the debts, then how is that devisee to be recouped and the proportion between himself and the others be made good? It appears to me

(a) 1 De G., M. & G. 635.

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me that the term of 500 years affords the necessary machinery for doing it; for if more than the proper proportion of the debts is paid out of the estate of one, and he is not recouped by the owners of the other estates, then there is a power created by which the trustees can enter under the term of 500 years, in order to set right the inequality which had been created by a sale of a portion of the estates to pay debts not contemplated at the time of the division, and which ought to have been paid rateably by the five sons at the time the partition was made. I do not think, therefore, that the creation of this term, which has a distinct and specified object supersedes the general charge for payment of debts, which, in my opinion, gives the executors a power of selling the estate for the payment of debts. And in that view of the case, I am of opinion that this is a valid contract.

It is very true that the Court will not compel a person to take a doubtful title; but if the Court is of opinion upon due consideration of the question of law, that the title is good, the Court is bound so to hold, and it cannot, in my opinion, decline to do so, because it is possible, that when the case arises between the parties some other Court may come to an opposite or contrary conclusion; and therefore I am of opinion that I am right, in this case, in compelling the purchaser to take what, in my opinion, is not a doubtful title. I shall certainly secure to the purchaser, as far as I am competent for the Court to do so, a good legal estate when the conveyance is made; but as I am of opinion that the executors had power to enter into the contract, which is not disputed, and as, in my opinion the title is good, I must decree a specific performance.

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## GALE v. GALE.

**O**N his marriage, in 1841, Mr. *Gale* conveyed an undivided share in a real estate to two trustees and their heirs, upon trust for himself and wife during their respective lives, with remainder to the children of the marriage; and in default (which event occurred) then as he should by deed or will appoint; and in default of appointment, to the children of *Edmund Estcourt Wilkins Gale* and of four other persons. The trustees were empowered, with the consent of Mr. and Mrs. *Gale*, to sell, and the purchase-money was to be laid out, with their consent, in the purchase of other freehold hereditaments in fee simple, to be settled to the same uses, and in the meanwhile it was to be invested, &c.

There was no child of the marriage.

Mr. *Gale*, by his will, dated in 1846, appointed the estate, from and after the decease of Mrs. *Gale* and failure of issue of the marriage, to *Wainwright* and *Norton* in fee, upon trust to sell, and to stand possessed of the purchase-money upon trust for the children of his brother *Edmund E. W. Gale* who should be living at his death. And the testator gave and devised to the Plaintiff (his widow), absolutely, all other his real and personal estate and effects, of what nature or kind whatsoever and wheresoever, to which he or any other

Jan. 28, 29.

Under his marriage settlement, *A. B.* had power to appoint the reversion in fee of the settled estates, and the trustees had a power of sale with his consent. *A. B.*, by his will, appointed it to trustees, to sell and stand possessed of the produce in trust for a class; and he gave all his real and personal estate "not therein before specifically disposed of" to his widow. Subsequently, the trustees, with *A. B.*'s consent, sold the estate; but, at his death, the conveyance had not been executed by one of the trustees, and the purchase-money had not been received.

Held (notwithstanding the 1 *Vict.* c. 26, ss. 19, 23), that, the gift to the class was inoperative, and that the purchase-money passed, under the residuary gift, to the widow.

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person in trust for him should be entitled at the time of his death, *not thereinbefore specifically disposed of*.

In *November*, 1849, the trustees of the settlement with the consent of Mr. and Mrs. *Gale*, contracted to sell the share of the estate for 1,300*l*. The conveyances were approved of in *December*, 1849, and, in *August*, 1850, were executed by Mr. and Mrs. *Gale* and by one only of the trustees.

Mr. *Gale* died in *September*, 1850. In *November* following the conveyances were executed by the other trustee, and the purchase-money was thereupon paid and invested in consols.

Under these circumstances, the Plaintiff, Mrs. *Gale*, contended, that the appointment made by the will to *Wainwright* and *Norton* was revoked, and that under the residuary devise in the will, she was entitled to the purchase-money. The Defendants, on the other hand, contended, that the Plaintiff was not so entitled, and in consequence of the dispute, the trustees refused to pay her any part of the stock, until the questions had been determined.

Mr. *Cairns*, for the Plaintiff. The appointment made by the testator is inoperative, for the subsequent sale, with the consent of the tenants for life, destroyed the specific property affected by the appointment, and operated as an *ademption*. That the proceeds did not pass under the 1 *Vict.* c. 26, ss. 19, 23 (The Wills Act), was decided by *Farrar v. Winterton*(*a*), and *Moor v. Raisbeck*(*b*). See also *In re The Manchester, &c. Railway Company*(*c*).

Mr.

(*a*) 5 *Beav.* 1.  
(*b*) 12 *Sim.* 123.

(*c*) 19 *Beav.* 365.

Mr. *R. Palmer* and Mr. *Freeling*, *contrà*. There has been an ademption, but the produce passes, as in default of appointment, to the persons ultimately entitled under the settlement, for the power cannot be considered as exercised in favour of the widow, inasmuch as a contrary intention is apparent on the face of the will (a), and the testator only gives her that which is not "thereinbefore specially disposed of." The appointment was inoperative, either as an appointment of the estate or of the purchase-money, and as the latter was, by the term of the settlement, to be reinvested on the same trusts as the lands sold, those trusts would, after the death of Mrs. *Gale*, prevail over the dispositions by the will.

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Mr. *C. Hall*, for the other trustee of the settlement.

Mr. *H. Sargant*, for the appointees under the will.

The 23rd section of the 1 *Vict.* c. 26, enacts, that no conveyance or other act subsequent to the execution of a will relating to any real or personal estate therein comprised, except a revocation, "shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." Here the testator had an interest in the estate at his death, for the purchase had not been completed and the purchase-money, which had not been paid, was a lien on the estate. It therefore passed by his will. The matter must be regarded as it existed at the time of the testator's death, for the 24th section provides, that, "every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately

(a) 1 *Vict.* c. 26, s. 27.



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immediately before the death of the testator, unless a contrary intention shall appear by the will." Therefore this devise must be construed as if the testator had by his will, executed immediately before his death, said :—"I devise every interest in the property which I now possess." Here the purchase-money had not been received ; it was subject to the widow's life estate, and liable to be reinvested, at any time, in fee simple lands. There is a distinction between the case where the absolute owner sells his estate after devising it, for then there is a conversion of his real estate into personalty ; but here the money retains the quality of land. Where a testator devises his estate to trustees to sell and pay the money to certain legatees, and he afterwards sells the estate himself (which, under the old law, is an ademption), the distinction would now seem to be this :—that if the money has not been received by the testator, the will pass to the legatees ; because, notwithstanding the sale, the will operates on the interest in the estate which the testator has power to dispose of, viz., the purchase-money, for which he has a lien on the estate (a) ; but, if the testator has received the money, the result is different. Here there is no gift of the land, but merely a devise to the trustee to sell ; it is a gift of the proceeds, and these consols are the proceeds.

Mr. Cairns, in reply. In the matter of *Spoone's* Trust (b), where a testatrix appointed a fund to A. and her other property to B., and A. predeceased her, it was held, that the fund subject to the power passed, and that, under the Wills Act, the residuary gift comprised not only all that was ineffectually attempted to be specially bequeathed, but all that was ineffectually attempted to be specially appointed.

(a) 1 *Sugd. Vend.* 10th ed. 304.(b) 2 *Sim. N. S.* 129.

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esent impression is, that there is an ademp-  
the property appointed, by the will by the  
nt sale of it. The testator has a power of  
ent over a particular property, and he appoints  
afterwards sold, and the testator gets the same  
appointment over another property. The will  
e an exercise of power over land which, for this  
did not exist at the date of it.

it being clear, that at the date of the will, his  
was that the residuary devise should not  
upon the property over which he had a power,  
ultly is, whether it is to operate on the property  
ed for it. In the simple case of a devise to  
fee simple estate and a devise to another per-  
ll the rest of the real estate, there would be a  
ention that the estate should not pass to the  
devisee; but if the testator afterwards sold it  
chased a new property, I should think that it  
ass under the residuary clause.

uestion is whether, where property is held in  
be sold and vested in other land on the same  
ere is not such an identity between the land  
nd the land sold, as to preserve the intention  
ould not be included in the residuary bequest.

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k the case of *Spooner's Trust* (a) satisfactorily  
of the point that the purchase-moneys pass to  
w. I had some doubt, but I think this must  
be

(a) 2 Sim. (N.S.) 129.

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be treated as a new estate and a new power in relation to it, and must be considered as disposed of by the residuary devise.

As to the invalidity of the appointment, I entertain no doubt, that the appointment by the will had no effect either on the new estate purchased with the produce of the old, or on purchase-money which stood in the place of the settled estate.

The Plaintiff, therefore, is entitled to the fund.

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18.

## HODGSON v. SMITHSON.

Bequest to A. for life, and after her decease to become the property of B., "or, in case of her decease, to be equally divided between her children living." B. died in the testator's lifetime, and her only child survived her, but died in the life of A. Held that the word "living" referred to the last antecedent, viz. the death of B., and that such only child took a vested interest, and that her legal personal representatives were entitled to the legacy.

BY his will dated in *February*, 1814, the testator bequeathed as follows:—"I give likewise unto my wife *Ann Hill*, the interest upon whatever money I may have in the 3*l.* per cent. Consols, or any other stocks I may have, during her natural life. I do direct that after my wife's decease, one half of the property belonging to me in the 3*l.* per cent. Consols shall be disposed of as follows:—[He then disposed of that half and proceeded.] The other half of my property in the 3*l.* per cent. Consols, shall (after my wife's decease) become the property of my cousin *Mrs. Morville*, of *Wakefield*, in *Yorkshire*, or, in case of her decease, I do direct that it shall be equally divided between her children *living*."

The will was dated in 1814. *Mrs. Morville* died in 1816, leaving *Mrs. Burrell* her only child surviving. The

and that her legal personal representatives were entitled to the legacy.

tor died in 1819, Mrs. *Burrell* died in 1820, the testator's widow had died "very lately."

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*Palmer* and Mr. *Brodrick*, for the Plaintiffs, were the executors of the husband and administrator of the will of *John Burrell*. The question raised is, whether the words "living" is to be applied to the children of Mrs. *Burrell* living at the event last before mentioned, or to the death of their parent Mrs. *Morville*, or whether it refers to the death of the tenant for life; and, if so, whether the daughter of Mrs. *Morville* have survived the tenant for life as well as Mrs. *Morville* in order to become entitled. The interest in the property is a vested interest on the death of the testator, and the same as that of *Coulthurst v. Coulthurst* (a). They cited *Ive v. King* (b); *Lyon v. Lyon* (c); *Masters v. Scales* (d); *Barker v. Barker* (e).

*Wynshaw* and J. H. *Palmer*, for the assignees of the husband, in the same interest as the Plaintiffs.

*Wynshaw* and Mr. *Bristowe*, for the next of kin of the testator, contended, that there was an intestacy as to this property, the fund, in consequence of the death of Mrs. *Burrell* in the lifetime of the testator, and of her daughter *John Burrell* having predeceased the widow, the tenant for life. They argued that the word "living" referred to the widow and not to that of Mrs. *Morville*, and that the period of division was the time for ascertaining the class to take. They cited *Edwards v. Edwards* (f); *Neathway v. Reed* (g); *Taylor v. Beverley* (h); *Wordsworth v. Wordsworth* (i).

101. 421.  
102. 46.  
103. 287.  
104. 60.

(e) 5 De G. & Sm. 758.  
(f) 15 Beav. 357.  
(g) 3 De G., M. & G. 18.  
(h) 1 Collyer, 108.

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*Wordsworth v. Wood* (a); *Galland v. Leonard* (b);  
*Hoghton v. Whitgreave* (c); *Cripps v. Wolcott* (d).

Mr. *Follett* and Mr. *Ware*, for the legal personal representatives of the testator.

Mr. *R. Palmer*, in reply, referred to *Hervey v. M'Laughlin* (e); *Woodstock v. Shillito* (f).

*The MASTER of the ROLLS.*

I determined, in the case of *Ive v. King* (g), that a distinction existed between a substitutional gift and a bequest to persons as a class, and one following a gift to a named and specified individual. In the former case, the class of persons cannot take by substitution unless the parent could have taken, but in the latter case, that is, where it is given to a particular legatee, the substituted legatee is introduced into the will in order to prevent a lapse. I accordingly, in that case, held, where the residuary estate of the testator had been given to the wife of the testator for life, and afterwards equally amongst five named and specified persons, with a direction that in case of the death of any one of those persons, the share was to go to his or her respective children, that the fact of the death of one of these persons before the death of the testator did not prevent the children of that person from taking the legacy, although such child, who survived the testator, died before the death of the tenant for life.

It

(a) 4 *Myl. & Cr.* 646; 1 *H. L. Cas.* 151.  
 (b) 1 *Sw.* 161.  
 (c) 1 *Jac. & W.* 146.

(d) 4 *Madd.* 11.  
 (e) 1 *Price*, 264.  
 (f) 6 *Sim.* 416.  
 (g) 16 *Beav.* 46.

It is contended, that the case of *Ive v. King* does not apply to the present will, first, on account of the effect to be given to the word "living," which, it is contended, has reference solely to the death of the tenant for life; and secondly, on the ground, that the period of distribution must be the period for ascertaining the class, according to the suggestion which I made in the case of *Edwards v. Edwards* (a). I am, however, of opinion, that this argument fails in the present case. I have re-considered my decision in the case of *Ive v. King*, and I concur in the distinction which I then took with respect to the substituted gifts. It follows from this, that the death of Mrs. *Morville* during the lifetime of the testator will not prevent her daughter from taking her share, unless the word "living" has that effect.

It still remains to be considered, at what time the class of children of Mrs. *Morville* is to be ascertained, and whether the surviving the widow is not made a condition precedent to taking the bequest. I am of opinion, that the class is to be ascertained, not at the death of the tenant for life, but at the death of the parent, subject always to this,—that as the testator survived the particular legatee, the class of children cannot be ascertained until the death of the testator. This principle is determined, in my opinion, by the authorities to which I was referred. In the case of a particular legatee, his children who are to take must be ascertained at his death, provided the particular legatee has survived the testator; if not, they will be ascertained at the death of the testator. This was the principle laid down in the case of *Lyon v. Coward* (b), which was to this effect:—there the testator gave his residuary estate in trust for his wife for her life, and after her

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(a) 15 *Beav.* 357.(b) 15 *Sim.* 287.

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her death it was to be sold and converted, and the moneys arising from it divided amongst the children of five persons who might be living at the time of the decease of his wife, and the issue of such of them as might then be dead, in equal shares and proportions. It is clear that, if it had to be divided amongst the children of his five sisters who were alive at the death of his wife, the case of *Leake v. Robinson* (a) would have been applied, and it could only have been given to the person who then survived; but he went on to say, "and the issue of such of them as might be then dead, in equal shares." One of those daughters had died during the lifetime of the tenant for life, leaving children, and one of those children so left died before the tenant for life. The Vice-Chancellor held, that the class was ascertained upon the death of the particular legatee, and, accordingly, that that child took a vested interest.

The same principle is also laid down in the case of *Barker v. Barker* (b). There the testator gave a sum of money to trustees, in trust to pay the interest to his daughter for her life, and after her death to divide the principal between all and every the children of his daughter who should be living at her decease, and the lawful issue of such of them as should be then dead, leaving issue, so that the issue of such child so dying should take the share which the parent would have taken if living, and so that such issue of each child so dying should take equally share and share alike. One of the children of the tenant for life died in her lifetime, leaving children, and one of those children died during the lifetime of the tenant for life. That child was held to have attained a vested interest.

It

(a) 2 Mer. 363.

(b) 5 De G. & Sm. 753.

It is therefore, in my opinion, clear, that, except for the effect of the word "living," the child of Mrs. *Morville*, who survived the testator, acquired a vested interest in this estate, though she predeceased the tenant for life.

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It then remains to consider the effect of the word "living," and whether that varies the case. In my opinion it does not. If it could be read as a condition that the legatee was not to take unless he survived the tenant for life, of course the intention of the testator so expressed must have that effect, but that, in my opinion, is not the effect. The word refers to the last antecedent, which is the death of Mrs. *Morville*. I read the words again to shew that this is clear. "The other half of my property in the 3*l*. per cent. Consols shall, after my wife's decease, become the property of my cousin Mrs. *Morville*, of *Wakefield* in *Yorkshire*, or in case of her decease" (that is, the decease of Mrs. *Morville*), then "I do direct that it shall be equally divided between her children living." Living when? Living at the decease of Mrs. *Morville*, which is the last antecedent to which it applies. It is not provided that such children shall survive his wife, nor is it a gift "to such as shall be living at the decease of my wife," but it is to those who shall be living at the decease of Mrs. *Morville*. It is simply the expression of that, which, according to the reported cases, would have been held to be the rule, in case the testator himself had not expressed it.

I am, therefore, of opinion, that Mrs. *Burrell* took a vested interest, and that her legal personal representative is entitled to a moiety of the fund, and I shall order accordingly.

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## FOWLER v. COHN.

March 6, 7.

Devise to the use of such of the children of *A. B.* and their heirs "for such estates," and in such manner and form as *A. B.* should appoint. Held, upon the context, to authorize an appointment to a grandchild.

A power to appoint an estate authorizes an appointment to trustees to sell and divide the produce between the objects.

IN 1788, the testator *John Fowler* devised a farm, partly freehold and partly copyhold, to three trustees and their heirs, to the use of his son *Charles* for life, "with remainder to the use of all and every, or such one or more of the children of his said son, whether born in his (the said testator's) lifetime or after his decease, and their, his or her heirs, for such estate and estates, by such parts and proportions, and in such manner and form, as his said son by deed should appoint; and in default of such appointment, &c., to the use of all the children of his son *Charles*, and the several and respective heirs of the bodies of all and every such children." There was a clause of survivorship in case any such children should happen to die without issue of their bodies, with divers remainders over.

*Charles*, the testator's son, by his will dated in 1842, directed the farm to be sold after the death of his wife (who was entitled to a life interest therein), and the net proceeds thereof to be divided into fourteen equal parts, which he devised as follows:—"To my son *John Roger Gresley*, to my daughters *Martha Gresley* and *Lavinia Albina*, and to my granddaughter *Eliza Sarah Lavinia*, three-fourteenth parts each; and to my daughter the said *Louisa Maria* two-fourteenth parts, and to their heirs, executors, administrators and assigns respectively."

The granddaughter was the only child of a deceased son.

*Charles*

*Charles Fowler* died in *November*, 1853, and *Martha*, his widow, in *February*, 1844.

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Questions having arisen as to whether the direction in *Charles* to sell the farm was a proper exercise of the power given by *John*, as to whether the appointment of three-fourteenths of the proceeds to *Eliza Sarah Lavinia Cohn* (now Mrs. *Cohn*) was valid, and whether the legal estate in the farm was to any extent appointed by the will of *Charles*, this bill was filed by *Martha Gresley Fowler*, one of the daughters of *Charles*, to determine these questions and the rights of the parties.

*Mr. Surrage* (in the absence of *Mr. R. Palmer*), for the Plaintiff. The appointment to a grandchild, under power to appoint to children, is invalid (a). The power authorizes an appointment to the children and their heirs; the latter words are the ordinary terms of a limitation in fee, and they merely authorize an appointment to the children in fee or for any less estate. The appointment by *Charles Fowler*, so far as it was made in favour of children, was valid; but so far as regards grandchildren, who are not objects of the power, is invalid; consequently the three-fourteenths appointed to Mrs. *Cohn* are unappointed, and go as in default of appointment. Secondly. The direction to sell the estate and divide the produce was perfectly valid, for a power to appoint an estate "authorizes, in equity, a sale and a gift of the produce of the estate;" *Crozier v. Crozier* (b). In *Trollope v. Linton* (c), it was held by Sir *John Leach*, that creating a term of five hundred years in trustees was a good legal exercise of a power to appoint, for such estate or estates, in such parts, shares and proportions,

(a) 2 *Sug. Pow.* 272 (6th ed.)  
(b) 3 *Dru. & War.* 371.

(c) 1 *Sim. & St.* 485.

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tions, and in such manner and form as the appointor should think fit; and that the words 'manner and form' enabled him to give equitable estates to his children." Here the words "manner and form" enabled the testator *Charles* to give equitable estates and interests. At all events, if a sale is not authorized, there ought to be a partition.

Mr. *Hoare*, for a Trustee. A power of appointing real estate is well executed by a devise to trustees to sell, and an appointment of the money produced by the sale; *Kenworthy v. Bate* (a), which case was approved of by Lord *Cottenham* in *Thornton v. Bright* (b).

Mr. *Greene*, in the same interest. First, if the words were used in the gift of an estate, and not in a power, there could be no doubt of their giving a fee. Secondly, the direction to sell is valid, but it cannot be carried into execution against the will of the parties beneficially interested, and a partition should be directed; *Hobson v. Sherwood* (c). [The MASTER of the ROLLS. In *Trevor v. Trevor* (d), a gift of an estate, to be settled on A. for life, with remainder to his issue in tail male, was held to be a life estate to A., with a remainder in tail male to his sons and daughters; if the construction of this will requires it, the same course may be followed.]

Mr. *Lloyd* and Mr. *Begbie*, for the granddaughter, argued that the power authorized an appointment to a grandchild, and that the word "issue" might be read "descendants."

Mr. *Surrage*, in reply.

The MASTER of the ROLLS reserved judgment.

The

(a) 6 Ves. 793.  
(b) 2 Myl. & Cr. 254.  
(c) 4 Beav. 184.

(d) 13 Sim. 108; 1 H. L. Cas. 239.

*The MASTER of the ROLLS.*

The question is, whether under the will of the original testator, *John Fowler*, the power given by him to *Charles Fowler* to appoint the estate made grandchildren objects of the power.

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It is to be observed, it entirely turns upon the meaning of the word "heirs," whether it is a *designatio personarum*, or a mere limitation of the estate which they are to take.

There can be no question that the ordinary meaning of the word "heirs," is merely a limitation of the estate, and that it must be employed in a peculiar and distinct signification in order to give it a different construction. However, it is only necessary to refer to the numerous instances which arise under executory documents, to see that the word "heir" is frequently used as a *designatio personarum*.

I referred yesterday to the case of *Trevor v. Trevor*, in which Lord *Hampden* made a will, and directed his estate to be settled on Mr. *Trevor* for life, with remainder to his issue in tail male; and it was held, that "issue" meant his children, and that being synonymous with children, it included daughters. There are many instances which are familiar to the Bar of cases where the word "heir" is necessarily used as a mere *designatio personarum*, and not a limitation of the estate.

In this case, I am of opinion, that it is *designatio personarum*, and not a limitation of the estate, and I come to that conclusion for this reason:—in examining the clause, you must ascertain who are the objects of the power, and what they are to take. They are to take such estate and estates, in such parts and proportions,

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portions, and in such manner and form as his son shall by deed or will appoint. The objects of the power are clearly the children; and then the will goes on to say, "and their, his or her heirs." If the word "heirs" is there used as a limitation of the estate which children are to take, it would be inconsistent to say, that they should take it for such estate as *Charles* shall appoint, because if he is only to give it to the children and their heirs, meaning thereby that they are to take it in fee, he cannot have the power afterwards to limit what estate they are to take, but only what parts, shares or proportions they should take. I am of opinion, that the word "heirs" must have been used to express the persons who are the objects of the power, and not the interests which they are to take; and that the objects of the power are the children of the son and the heirs of the children of the son.

Then comes the question, what is the meaning of the word "heirs," and that, in a great measure, is made clear by the rest of the will, which directs how this property is to go in default of appointment, for, in default of appointment it is to go, not merely to the children, but to the heirs of the body of the children, and in default of appointment, he uses the words "heirs" and "issue" of the children indiscriminately. I am, therefore, of opinion, that he uses the word "heirs" in the same manner as in the earlier part, and that the word "heirs" means "issue," and, accordingly, that the objects of the power are the children and the issue of the children, and that they are to take, "for such estate and estates, in such parts and proportions, and in such manner and form" as his said son *Charles*, by deed or writing executed as therein mentioned should direct, and as he has appointed three-fourteenths to the granddaughter, the consequence is, that she is entitled to take that portion.

As

As to the proposition, that a power to divide an estate authorized a decree to sell and divide the produce; I find it quite settled by the authorities, that a general power of disposition of the whole property includes the power of sale, and, consequently, the power of sale is incidental to the power of disposition of the property in such manner and form, although the original will does not expressly include a direct power of sale. I will make a declaration upon these two points, and decree accordingly.

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## ROBINSON v. KITCHIN.

THE Defendants, *Kitchin* and *Gregson*, carrying on business in co-partnership as *stock and share brokers*, were employed by the Plaintiff from *June*, 1850, down to *December*, 1852, as his brokers in buying and selling shares and bonds in British, Colonial and foreign railway and mining companies, and in buying and selling the stocks of foreign countries. In the course of such dealings and transactions, certain sums of money were paid to or retained by them in respect of commission, continuation and brokerage. *Kitchin* was the partner under whose direction and advice the Plaintiff principally acted.

The Plaintiff alleged, that he had lately discovered, that the Defendants, during the period they were so employed by him as his brokers, acted as jobbers as well as brokers; and that in many cases, they were the sellers, acting as a broker without payment of the fees imposed by the 57 Geo. 3, c. lx.

Jan. 15.

A man who holds himself out to the world as a sworn broker, thereby impliedly asserts that he has taken the steps necessary to qualify himself to act as such, and he will be bound to give discovery, to parties employing him as a broker, respecting his dealings and transactions as such, though he may thereby subject himself to pecuniary penalties, payable to the city of London, for

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sellers, and acted as principals, though professing to act as brokers, and that they had entered into no bargain for the purchase or sale of shares, &c. on his behalf except through their own books, and that they had fictitiously used the names of other persons to deceive and cheat the Plaintiff. That, in many instances, they had advised the Plaintiff to close particular transactions, and nevertheless, had continued the same themselves, and made considerable profit thereby; that, in transactions which they had advised him to keep open, they charged him with continuation money, besides appropriating the gain on a fall or rise in the market; and that they had thereby defrauded the Plaintiff.

The Plaintiff by his bill prayed an account.

The Defendants, severally, declined to answer the interrogatories as to the dealings and transactions between them and the Plaintiff, on the ground that the discovery of all or any of the matters declined to be answered would tend to subject them, respectively, to the penalties imposed by "The Act for granting an Equivalent for the Diminution of the Profits of the Office of Gauger of the City of *London*, and increasing the Payments to be made by Brokers" (57 *Geo.* 3, c. 1x). This Act (s. 1) enacted, that all persons admitted to act as brokers, within the city of *London* and liberties thereof, by the Court of Mayor and Aldermen of the said city, in pursuance of stat. 6 *Ann.* c. 16, should, upon their admission, over and above the sum of 40s., by the last-mentioned Act required to be paid, pay to the Chamberlain of the said city the sum of 3*l.*, and should also, yearly, pay to the chamberlain, over and above the yearly sum of 40s., required by the same Act to be paid, the sum of 3*l.* By s. 2, it was enacted, that if any person should take upon him to act as a broker or employ any person

person under him to act as such (not being admitted, in pursuance of the said recited Act) every such person, so offending, should forfeit and pay to the use of the Mayor and commonalty and citizens of the said city, for every such offence, the sum of 100*l.*, to be recovered, &c.

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The Plaintiff took exceptions to the answers, and he gave notice of motion for production of documents. The exceptions and motion came on to be heard together.

Mr. R. Palmer and Mr. Rudall, in support of the exceptions and motion.

This is an attempt to misapply the principle, which protects a Defendant from a discovery of that which would expose him to penalties. The Defendants refuse all discovery, alleging, simply, that it would render them liable to penalties; they do not say they are not sworn brokers, but simply set up the statute as a protection against discovery. Being a private Act, however, it would be strange if it imposed anything in the nature of penalties, inasmuch as penalties are imposed in respect of acts of a public nature, and in their nature *malaprohibita*. This is a mere money question between the Brokers and the city of London and nothing more, and nobody reading the Act can say, that it constitutes any *malum prohibitum*. The increase of the penalties is the particular mode of compensating the city for the loss of the right of gauging in the London Docks; and it would be a very singular case, if the statute rendered a thing illegal, for which it provides a mere money payment as a compensation or as the mode of enforcing payment of a fee payable by persons practising as brokers. *Green v. Weaver* (a) was the case of a woolbroker, the

(a) 1 Sim. 404.



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the bill alleged much the same case as the present, and the Defendant insisted on protection, on the ground of his being subject to penalties under the 6 *Ann.* c. 16; but the Vice-Chancellor held, that the privilege could not be supported. No subsequent case affects that decision, nor is such a defence available, except where the public law of the land steps in and declares the act to be illegal; the Court will then pay regard to that circumstance; but here the object is not to make an act illegal, but to raise money for the benefit of the city of *London*. They cited *The King of the Two Sicilies v. Willcox* (a); *Johnson v. Hudson* (b); *Smith v. Mawhood* (c); *Fisher v. Price* (d); *Mitf. Plead.* (e).

Mr. *Follett* and Mr. *Martindale*, for *Kitchin*. In the first place it is to be observed, that in the second section of the 57 *Geo.* 3, c. 60, it is recited, that by 6 *Ann.* c. 16, it was enacted, "that if any person should take upon him to act as a broker, not being admitted as aforesaid, every such person so offending should forfeit and pay the sum therein mentioned." That, however, is repealed by the second section of the 57 *Geo.* 3, c. lx., which enacts, that every person so offending shall forfeit and pay to the city for every *such offence*, the sum of 100*l.*, recoverable," &c. So that the question is not one merely of money, but has a much wider scope, for it treats the act as an "offence." The Act of Parliament has two objects, first, to put the brokers, who pursue their calling in the city, under the control of the court of the Mayor and aldermen; and, secondly, to impose

(a) 1 *Sim.* (N. S.) 329, 330.

(b) 11 *East*, 180.

(c) 14 *M. & W.* 452.

(d) 11 *Beav.* 194.

(e) Page 195 (4th ed.)

the penalties on such as act, without admission  
payment of the sums prescribed; that is, it is "an  
e" to act as broker without complying with the  
elements of the act, and a penalty is fixed "for  
such offence." So by the 7 Geo. 2, c. 8, s. 8  
Stock Jobbing Act), time bargains are made an  
x by imposing a penalty on such as make them.  
difficult to escape the case of *Green v. Weaver*,  
applies to this case, but it is not consistent with  
quent decisions, as, for instance, *Short v. Mer-*  
*a*). It is not the illegality of the act but the  
ty which forms the ground of protection. They  
*Robinson v. Lamond* (b); *Fisher v. Ronalds* (c).

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. *Roupell*, for *Gregson*. None of the authorities  
own the principle, that a criminal penalty alone,  
not a money penalty, will protect a Defendant from  
y discovery. The distinction is taken in *Green v.*  
*er* (d), between criminal matters and money pe-  
s; but *Paxton v. Douglas* (e) shews that the  
iple of the decision in *Green v. Weaver* is not  
l; *Williams v. Trye* (f). Nobody can contract  
elf out of the privilege of protection, or by agree-  
deprive himself of the benefit of it; *Lee v.*  
!(g).

. *R. Palmer* was not called on for a reply.

ie MASTER of the ROLLS.

think in this case, that there is no protection, and  
the Defendants are bound to answer and produce  
the

2 De G. & Sm. 635; 3  
& Gor. 205.  
15 Jur. 240.  
12 C. B. 762.

(d) 1 Sim. 404.  
(e) 19 Ves. 225; 16 Ves. 239.  
(f) 18 Beav. 366.  
(g) 5 Beav. 381.

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the documents in question. In my opinion, *Greaves v. Weaver* is not only perfectly good law, but it quite reconcilable with *Short v. Mercier* (a), and the whole of that class of cases; but I am not sure whether should put the case on an implied contract, as was done by Sir *Anthony Hart* (b). In the first place, I think the dictum of Lord *Langdale*, in *Lee v. Read* (c), that a man could not, on due consideration, contract that he would not avail himself of his legal privilege to protect himself from discovery, could not have been intended to apply to such cases as the present. I think that a person may contract not to avail himself of any privilege which the law gives him. Undoubtedly, it is an ordinary case to contract, as to a particular matter with this reservation:—"any rule of law or equity to the contrary notwithstanding." It is merely stating this maxim—*Modus et conventio vincunt legem*. In fact, persons may contract to waive any privilege which by law they are entitled to.

I do not mean to express any opinion on the Stock Jobbing Act, or what would be the effect of persons contracting between themselves not to avail themselves of the privilege to avoid any disclosure, but it would be a new thing to me, if, after such a contract, this Court should allow such persons to avail themselves of any such privilege. Certainly, the cases of *Parton v. Douglas* (d), and *The East India Company v. Neave* (e), and the statement of Lord *Redesdale* in his treatise (f), establish, that a person may contract not to avail himself of his privilege. But that is distinct from the case of *Short v. Mercier* (g), which was this:—two persons

(a) 2 De G. & Sm. 635; 5 Mac. & Gor. 205.

(b) 1 Sim. 404.

(c) 5 Beav. 585. Lord *Langdale* refers to "a criminal charge," and not to a pecuniary penalty.

(d) 16 Ves. 239 and 19 Ves. 225.

(e) 5 Ves. 173.

(f) Page 193, 4th ed., and see *Beames on Pleas*, 262.

(g) 2 De G. & Sm. 635 and 3 Mac. & Gor. 205.

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sons entered into an arrangement which they knew  
prohibited by law, and, thereupon, when one came  
ask for an account of that transaction, the other said,

will not make myself liable to any penalty re-  
cting it. You were perfectly aware that it was one  
the conditions entered into between us, that I should  
be bound to make any disclosures. The law says  
I am liable to penalties, and, as a necessary con-  
quence, I am not bound to say anything relating to

That case is extremely different from that of a  
son who is ostensibly carrying on the business of a  
orn broker in the city of *London*. Not only is there  
thing illegal in that business, but it is a perfectly  
est profession, which every man is at liberty to  
ry on, and a man who professes to act in that  
racter, does not so much enter into a contract as  
itively asserts, that he is properly qualified by law  
l is enabled to perform all the acts and duties re-  
red of him in that particular character. So, if a  
son undertakes to deal in spirits or tobacco, or the  
e, he impliedly asserts, that he is duly qualified, and  
t he has taken out a licence to enable him to trade in  
t particular article. I treat the matter in this light :—  
those cases which I have so often had to deal with,  
which the Court compels a man to make good his  
ative and his implied assertions. The enforcement of  
th is the foundation of the whole equity, and the man  
o asserts a thing, either by his actions or by express  
rds, shall never afterwards be allowed to contradict  
at he has so asserted. In this case, the Defendant  
oliedly asserted, that he was authorized to act as a  
orn broker, and a person who holds himself out as a  
lker impliedly asserts, that he has done all that is  
ecessary to enable him to act properly and effectually  
such ; for otherwise no person would employ him.  
ving so asserted, it is not open to him to say,

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"I made you believe it, though such is not the fact. I have not done that which I ought to have done. I have made myself liable to penalties, the result of which is, that you cannot obtain from me any information as to the transaction in which I have been employed by you." In my opinion, that is not the law of this Court, nor the law of the land. A person holding himself out and acting as a broker, asserts that he is duly qualified so to act. Sir *Anthony Hart* put it in the nature of an implied contract: I do not quarrel with that expression, but I would rather put it on the ground that I have myself stated, although possibly the distinction is merely verbal.

But observe how different is a stock jobbing transaction, in which both parties know that it is illegal. In *Short v. Mercier* and *Robinson v. Lamond* the parties perfectly well knew that the transaction was an unlawful transaction, and that penalties must necessarily be incurred, and that neither party could obtain discovery.

I approve of the cases of *Green v. Weaver* and *Shaw v. Mercier*, both of which lead to this conclusion, that the Defendant is bound to give the information required (a).

(a) See *Sidney Smith's Pr. of Eq.* 37—41.

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NOTE.—Affirmed by the Lords Justices, February 18, 1856.—

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WINDUS v. WINDUS.

**T**HE testator had freehold, copyholds, leaseholds and personal estate of his own, and, besides these, it was admitted, that under his marriage settlement, he had a power of appointing freeholds, leaseholds and a sum of stock to his children.

By his will, made in 1837, he, amongst other legacies, bequeathed one of 5,500*l.* to his son *Eric*. "And 5,000*l.* to his son *Alfred*, to be vested at twenty-five, and, in the meantime, the dividends, &c. to be applied for their maintenance and education respectively." The testator also gave particular directions as to his leasehold residence at *Stamford Hill*. "And as to all his freehold, copyhold and leasehold" hereditaments, &c. he devised and bequeathed the same unto his sons *Thomas* and *Ansley*, as tenants in common, and their respective heirs, &c.; "and as to all the rest, residue and remainder of his personal estate," he bequeathed the same to his sons *Thomas* and *Ansley* equally. He appointed *Thomas* and *Ansley*, and his nephew *Benjamin*, executors.

*Thomas* died in *June*, 1838, without issue, and intestate.

Afterwards, in 1843, the testator made a codicil, in these words:—"Whereas, since the making of my will,

*Feb. 29.*  
In a will, the words "I constitute *A.* and *B.* my residuary legatees will not pass real estate.

A testator gave several pecuniary legacies, including one to his son *A.*, and devised his freehold, copyhold and leasehold estates to his sons *B.* and *C.* as tenants in common, and appointed them his executors. *B.* died, and by a codicil the testator appointed *A.* executor in the room of *B.*, and revoked the legacies given to *A.* and *C.*, and appointed them "residuary legatees," and, under a power, appointed freehold and leasehold property, comprised in his marriage settlement to my "the residuary legatees,

his sons *A.* and *C.*" Held, that the moiety of the freehold estates devised to *B.* had lapsed, and descended on the testator's heir (*C.*), and that *C.* took the other moiety under the unrevoked devise in the will.

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my son *Thomas Windus* has departed this life, in the place and stead of him I appoint my son *Eric*, jointly with his brother *Ansley Windus*; also my daughter *Matilda Moore*, as an executrix, in the room of my nephew *Benjamin Windus*, whose former appointment I do hereby revoke." "My said two executors and executrix are to act also as trustees, with the same power and the same indemnity, as if originally named both as executors and trustees. I do also revoke the legacies to my aforesaid two sons *Ansley* and *Eric Windus*, and do appoint them *residuary legatees*, share and share alike. The testator then adverted to his power, and after stating his dealing with the funded property, proceeded thus:—"I do declare, that the freehold in *Whitecross Street*, and the leasehold property in *Pentonville*, *Compton Street*, *Soho* and elsewhere, agreeably to the said marriage settlement, I mean to go to the *residuary legatees*, namely sons *Ansley Windus* and *Eric Windus*, share and share alike." He then altered his disposition of the *Stamford Hill* leasehold.

The testator died in *December*, 1854, leaving *Ansley* his eldest son and heir-at-law, who instituted this suit claiming to be entitled to one moiety of the freehold and copyhold estates as specifically devised to him, and to the other moiety (which had, as he contended, lapsed by the death of *Thomas*) as heir-at-law of the testator. *Eric*, on the other hand, claimed to be entitled to the latter moiety of the freeholds as "*residuary legatees* substituted for *Thomas*."

Mr. *Swanston*, Mr. *Lewin*, and Mr. *J. A. Foote*, 1 the Plaintiff. The heir-at-law can only be disinherited by express words or necessary implication. The moiety of the testator's freehold estates, which were specifically devised by the will to *Thomas*, lapsed by his death

the testator's lifetime, and not having been devised by the codicil, they passed to *Ansley* as the testator's heir-at-law. Nothing is said as to real estate in the codicil except as to the freehold in *Whitecross Street*, which was settled property; the codicil is silent as to the testator's own unsettled real estate. The testator evidently had his will before him at the time of making the codicil; he refers to it in the codicil, in the clause in which he appoints his two sons his residuary legatees, and revokes their legacies given by the will. There are four things he wished—to vary the appointment of executors and trustees, to exercise the power of appointment over the settled property, to revoke the legacies to his sons *Ansley* and *Eric*, and to give his residuary personal estate to *Ansley* and *Eric*. Those were the purposes contemplated by the codicil, and it would be difficult to see how it effects anything more, for it cannot be argued, that by the mere appointment of "residuary legatees" the real estate would pass. He must have known that the specific devise had also failed, and yet, though he has supplied the place of *Thomas* with regard to the residuary personal estate, there is no part of the codicil which indicates any intention of depriving his heir of that which he must have known, when he executed the instrument, would otherwise descend to him. If he had intended that *Ansley* should not take the lapsed moiety of the specific devise, why not express the intention? There are two parts of the codicil to which reference will be made in favour of *Eric*; first, the words "in the place and stead of him I do constitute and appoint my son *Eric*, jointly with his brother *Ansley*," &c. That clause, however, does not give *Eric* all that the testator had, by the will, given to *Thomas*; on the contrary, it is a clause limited to the appointment of certain offices. To hold that it had a greater operation, would not only be at variance with the

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the express terms, but would also expunge subsequent portions of the will; for if by this substitution *E. Windus* was, to all intents and purposes, placed in the position of *Thomas*, there was no need to appoint "residuary legatees;" it was already done, and a portion of the will would not only be surplusage, but contradictory to other portions, for the substitution of the office is in joint tenancy, and would pass to the survivor, whereas what is afterwards given to them is expressly as tenants in common, viz., "share and share alike." Secondly, as to the alteration in respect of the *Stamford Hill* house that was leasehold, and the clause related to the personal estate alone, and affords no ground for arriving at the conclusion that the heir is to be disinherited. It is enough for the heir to say, there are no express words or necessary implication to disinherit him, even though there was a strong indication of intention to do so; but here the evidence of intention is all the other way. The phrase "necessary implication" is in practice sufficiently definite; there must, beyond doubt, be evidence of intention to raise it;—there must be evidence, beyond doubt, upon the words of the will, of an intention to disinherit; *Kellett v. Kellett* (a). There were there expressions which raised a judicial doubt whether the testator did or not intend to disinherit the heir, but that proved insufficient. The words here used are to be taken in their usual and known acceptation, unless there is strong evidence to the contrary; *Church v. Mundy* (b); *Saumarez v. Saumarez* (c); and the same principle was recognized in *Coard v. Holderness* (d). The expression "residuary legatees" is therefore confined to personalty.

Mr. R. Palmer and Mr. Rogers, *contra*. Nobody would

(a) 1 B. & B. 533; 3 Dow.  
218.  
(b) 12 Ves. 426.

(c) 4 Myl. & Cr. 331.  
(d) 20 Beav. 147.

would contend that words appointing an executor would constitute a devise of real estate; but if an intention appears on the face of the will to give property it must be held to pass. As to "doubt" and "necessary implication," the Court must be satisfied from the instrument of an intention to give, and, if so, it will act upon it. Many wills are obscure, and the means by which the intention is arrived at and ascertained are not always satisfactory; but, nevertheless, the Court often comes to a conclusion as to what the intention is, from the different clauses and inconsistent expressions in a will. Here the testator, by the words "residuary legatees" in the codicil, intended to describe the persons who were to take all the property comprehended in the general gift in the will in favour of *Thomas* and *Ansley*.

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*Thomas* having died, the object of the codicil was to supply the gap and prevent an intestacy, by substituting *Eric* for *Thomas*. But the material clause is this:—"I do revoke," &c. It is assumed by the other side that the testator makes *Ansley* and *Eric* "residuary legatees" of his personal estate only, but there is not a word about personal estate. The real question is, what is meant by the words "I do revoke?" &c. It is clear he means to revoke the whole of the gift in the will in favour of *Ansley* and *Eric*, and to appoint them to the same position, which was occupied under the will by the persons who were therein named "residuary legatees," so that they should take every thing that those persons would have taken. It is argued, that "legacy," "legatee," "residuary legatee," as used in the will, are all to be held to apply to personal estate only; but the word "legatee," derived from *legare legatum*, is as applicable to real as personal estate. The meaning of the testator is evident, from the mode in which he subsequently applies the same words "residuary legatees," for he de-

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vises the freehold in *Whitecross Street* to the "residuary legatees." Then what is the legacy in the will given to *Ansley* which is revoked? It would be an unsatisfactory answer to say it was the residue of the personal estate, for it would be a forced and unnatural construction to suppose he meant a revocation of the residuary personal estate, in order to give back again precisely the same interest. The language is peculiar, it is not "I give them the residue of my personal estate," but "I appoint them my residuary legatees." The words "residuary legatees" are not used at all in the will, nor is that character noticed. Those words may indeed be thought *primâ facie* to have relation to "residue and remainder of my personal estate;" but when it is considered that the persons who, under the will, are to take the residue and remainder of the personal estate, are the same persons who are to take the whole of the freehold, &c., and looking to the other circumstances, this peculiar language will be easily understood to be a description of the persons who under the will were to take, and as substituting these persons for the same interests as were formerly given to other persons.

The authorities shew that the expression is extremely flexible, and may be moulded to effect the real intention. In *Davenport v. Coltman* (a) the testator had a freehold house in *C.*, and estates in *H.* and *L.* He gave pecuniary legacies to his heir and to his two daughters *M.* and *C.* He gave to his wife for her life, his house, his plate, and stock in the funds. He then proceeded thus:—At her decease it is my will that *M.* and *C.* shall divide equally, as *residuary legatees*, whatever I may die possessed of. The Vice-Chancellor of *England* held that *M.* and *C.* took an estate in fee, in remainder expectant

(a) 12 Sim. 590.

**P**ectant on the death of the testator's widow, in the house in *C.* and the estates in *H.* and *L.*

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In *Day v. Daveron* (a) a testator gave a freehold house to his wife for her sole use and benefit, and another freehold house to her for her life; and he also gave to her all his household goods, plate, &c.; but, if she married again, the whole of the above property was to become the property of his daughter; and, in case his wife should remain unmarried, then he gave the second-mentioned house to his daughter for her life, and to her children, after his wife's death. He proceeded in these words:—"I also appoint my wife, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease." It was held, that the fee simple in the first-mentioned house passed to the wife.

In *Evans v. Crosbie* (b) the testator gave all his real and personal estate to *James* and *Malcolm*, their heirs, executors, &c., in trust thereout to pay a legacy of 1,500*l.*: and, after giving 1,000*l.* to *James*, he left to his brother, *Donald*, 2,000*l.*, and added, "and also to be my residuary legatee," after which he gave 200*l.* to another of his sisters. The Vice-Chancellor of England held, that *Donald* was the testator's residuary devisee as well as legatee; and in giving judgment he observed, "It seems to me that the cases of *Day v. Daveron* and *Davenport v. Coltman*, have a value with regard to this case in this respect, that they are the authorities as to the use of the word 'legatee' as applicable, in the minds of the parties who used it, to a disposition of real estate. It is true, that in those two cases, the Court looked, as it ought to do, at the whole of

(a) 12 Sim. 200.

(b) 15 Sim. 600.

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of the will: but those two cases prove that persons not well educated, or, at least, not well instructed in law, use the term 'legatee' as designating the person who, by virtue of their gift, is to take land as well as personalty. In both those cases the term was used by persons who meant to describe those who were to take the real as well as the personal estate. If instances were wanting, no one could doubt, that in common parlance, the term 'legatee' implies the person who takes a benefit by the will." The substance of the intention was, that the two elder sons for the time being should take the whole property.

They cited *Hope v. Taylor* (a); *Hardacre v. Nash* (b); *Pitman v. Stevens* (c); *Warren v. Newton* (d); *Doe d. Roberts v. Roberts* (e); *Underwood v. Wing* (f).

Mr. Babington, for a trustee.

Mr. Lloyd and Mr. Kirkman, for other parties.

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*The MASTER of the ROLLS.*

I entertain no doubt as to the construction of this will and codicil; the cases cited are all perfectly distinguishable, and do not affect the question before me. I first look at this case as if there were nothing but the codicil, and I then look at it in conjunction with the will; and it appears to me impossible, in either view,

- (a) 1 Burr. 268.  
(b) 5 T. R. 716.  
(c) 15 East, 505.  
(d) Dru. 464.

- (e) 7 Mees. & W. 382.  
(f) 19 Beav. 459 and 4 De G., M & G. 633.

view, to say, that there is any disposition of that portion of the real estate which was originally given to *Thomas*. Suppose the codicil stood alone and there was no will, it is quite settled by *Kellett v. Kellett* (a), and *Day v. Daveron* (b), if indeed it wanted such authority, that these words, "I constitute A. B. and C. D. my residuary legatees," standing alone, without any context and without anything to assist the construction, would not disinherit the heir, and that the words "residuary legatees" would have a definite and technical sense applying simply to personal property. It is perfectly true that the terms are very flexible, and that if it can be shewn, by the testator's will, that he used them in a different sense, that different sense must be applied to them. That is really all that is shewn by the cases which have been referred to. In the case of *Day v. Daveron* the words were, "I appoint my wife, provided she remains unmarried, sole executrix and residuary legatee of all other property I may possess at my decease," and the question was, whether the words "all my property" were to be cut down to personalty, or whether the word "legatee" was to be extended to real as well as personal estate, and the Vice-Chancellor thought, as probably everybody else would think, that the subject of the gift was all the property, and that the testator was merely directing how the residuary legatee was to take.

In the case of *Davenport v. Coltman* (c), the words were, "shall divide as residuary legatee whatever I may die possessed of." The question was very much of the same character, whether the words "whatever I may die possessed of" were to be cut down to personal estate.

The

(a) 3 Dow. 248.  
(b) 12 Sim. 200.

(c) 12 Sim. 588.

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The case of *Evans v. Crosbie* (a) is undoubtedly a peculiar case. I think, from the judgment, that the Vice-Chancellor rather proceeded upon the fact, that the testator seemed to have anticipated that the real estate would, to a great extent, be converted into money, and that the personal estate would, probably, be insufficient to pay the legacy without the aid of the real estate :—that the residuary gift should not take effect till all the legacies had been satisfied, and that *Donald* should take every thing after payment of the legacies.

I consider it then to be settled, that if the words stood alone, “I constitute *A. B.* and *C. D.* my residuary legatees,” they would only affect personal property, and would not affect real estate, and that the real estate would not pass under those words. But then, they are coupled with the words, “I do also revoke the legacies to my aforesaid two sons *Ansley* and *Eric Windus*, and do appoint them residuary legatees, share and share alike;” that, no doubt, refers to the original will, and then you turn to the original will, in which the word “legacy” is repeatedly used, but only with reference to personal estate. The testator says “I revoke the legacies to my two sons *Ansley* and *Eric*, and appoint them residuary legatees.” Can it be said, that the words “residuary legatees” are to extend to real estate, when we find, upon reference to the original will, that the testator has accurately confined the word “legacy” to personal estate?

I find also, that the testator, in the original will, has made a distinction between the disposition of his real and of the residue of his personal estate. He first devises

(a) 15 Sim. 600.

devises the former, and then by a separate clause bequeaths the latter. Having made a distinction between them, am I to assume that he did not understand that distinction when he made the codicil, and which is a part of the will?

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It is very true, that, looking at the scope of the will and codicil, and seeing that by his original will he intended, as it were, to make the two eldest sons inherit his property equally between them, that something of the same disposition may be observed on the codicil, and it may be thence inferred, that the testator has not, in this codicil, really expressed his intention with respect to the disposition of his property. I may speculate upon this, but I am satisfied, that if I were to go beyond a mere speculation and say that I am to carry it into effect as if he had expressed it, I should be making a will for the testator, and not construing what he himself has stated.

An argument has been adduced from the circumstance, that in the codicil the testator has appointed the freehold property comprised in his marriage settlement to his residuary legatees. If he had said, that his residuary legatees should take the whole real estate, or if that intention could be discovered from that circumstance, it would be very strong no doubt in favour of the residuary legatees; but I cannot find such an intention. If the real estates had not been comprised in the settlement, the devise of them would obviously have an opposite effect, because it would shew, by the devise of a particular messuage to his residuary legatees, that he did not intend the whole to pass. Now it appears to me, that by the expression "residuary legatees," in the appointment of the settled real estate, the testator means nothing more than a description of the persons who



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who are to take this property appointed under the marriage settlement, and that it has no other significance or meaning.

Undoubtedly, it is true, that by the revocation of the legacies to the two sons, he does, apparently, what it is very probable that it was not his intention to do, if he had seen the full effect of it, that is to say, he takes away the 5,000*l.* from *Eric*, while he merely takes away the leaseholds from the other brother, and, in effect, he gives half of that legacy of 5,000*l.* to the elder brother. If he had been told what the effect of that might be, it is very probable that he would have expressed himself otherwise.

But he has not done so, and I feel satisfied, upon the face of this codicil, that there is no disposition of that portion of the real estate which lapsed by the death of *Thomas* in the lifetime of the testator.

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NOTE.—Affirmed by the full Court of Appeal, 5th August, 1856.

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testatrix gave and bequeathed unto each of her three granddaughters, *Jane, Mercy and Martha*, of 150*l.*, and she directed her executrices to these legacies, in their own names, in the purchase per Cent. Navy Annuities, and in like manner to the dividends, in order that the same might accrue until her grandchildren should severally attain one; and upon their severally attaining twenty-one directed their respective legacies, with the additions, to be paid to them.

testatrix then bequeathed a leasehold property, and her residence, to *Elizabeth Smith* and *John Smith*; and she appointed *Elizabeth Smith*, wife of *James Grant Smith* (who renounced) executrices.

testatrix died in 1821, and in the same year, her will was proved by *Elizabeth Smith* alone. In 1822 *John Smith* married *John Smith*, who, in 1822, received his wife's share in the leasehold for 999*l.* 10*s.*; he received the other assets and allowed part to remain out on the personal security of *James Grant Smith*, the greater part of which was lost by his bankruptcy.

*Elizabeth Smith* attained twenty-one in 1825, and her legacy was paid, and some payments had been made to the legatees.

*John Smith* died in *February*, 1835, and he appointed

her legal personal representative was not a necessary party.

The husband of an executrix or administratrix is liable for all the assets received or *deceitfully* committed by himself or by his wife during the coverture, and his estate remains liable after his death.

The husband of an executrix, who was liable for a breach of trust, made his wife and two others his executrix and executors.

"They possessed themselves of all his assets."

Held, that the husband's liability was not satisfied by the circumstance of his widow uniting in herself the two characters; and in a suit to charge the husband's assets, an inquiry as to the amount of such assets received by her was refused, and it was held, that

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his wife and the two Defendants executors. The Plaintiff *Martha* attained twenty-one in *March*, 1835, and she received some small payments, on account, down to *June*, 1837.

*Elizabeth Smith*, the executrix of the original testatrix, died in 1837. The Plaintiff *Martha* having made many applications for her legacy, which were unsuccessful, she and her husband instituted this suit *May*, 1854, against the representatives of *John Smith* to compel payment.

The bill contained the following paragraph, which was relied on by the Defendants:—

“ 12. The said *John Smith* died seised and possessed of a large real and personal estate, and the Defendants *James Grant Smith* and *John Smith* and the said *Elizabeth Smith* possessed themselves, as the executors of the said *John Smith*, of all the personal estate and effects of the said *John Smith*; and after the decease of the said *Elizabeth Smith*, the same were possessed by the Defendants *James Grant Smith* and *John Smith*. ”

The Defendants stated that they had administered the estate of *John Smith*, and, in 1846, paid over the residue of his personal estate and effects to the residuary legatees under his will.

*Mr. R. Palmer* and *Mr. W. D. Lewis*, for the Plaintiff, insisted, that a trust had been created by the will of the testatrix in favour of *Martha*, that *John Smith* had been guilty of a breach of trust, by not investing and accumulating the Plaintiff's legacy, in pursuance of the trusts, that the estate of *John Smith* was liable, and that

that he had admitted assets by payment of the other legacy and handing over the residue.

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**Mr. Follett** and **Mr. Berkeley**, *contrà*, contested the liability of *John Smith's* estate, *Adair v. Shaw* (a), and argued, that if there had been any liability, it was satisfied, in consequence of his having appointed his wife (who was the executrix of the testatrix) his executrix, and who must, therefore, be assumed to have discharged any liability of *John Smith* out of his assets in her hands; *Tyler v. Bell* (b). They also insisted on the lapse of time, and on the laches and acquiescence of the Plaintiff.

**Mr. R. Palmer** was not heard in reply.

**The MASTER of the ROLLS.**

My opinion is that the estate of *John Smith* is liable. There are two questions, first, whether there was ever any demand against the assets of *John Smith*? and, secondly, whether such demand has been satisfied by what has since taken place? In my opinion, it is now settled law, that a husband is liable for all the assets received or *devastavit*s committed, either by himself or by his wife, during the coverture, in respect of an estate of which his wife was legal personal representative; and that, in this respect, the husband is liable, at law, during his life, and his estate after his death.

The first question here is, whether his estate was liable, and whether there is proof of any assets having been received. It is, in my opinion, clearly established, that there was an admission of assets by *Elizabeth*, the

(a) 1 Sch. & Lef. 243.

(b) 2 Myl. & Cr. 89.

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the executrix, and also by himself; for, in the place, *Jane*, who stood in exactly the same position as the Plaintiff *Martha*, was paid her legacy in 18 during the coverture, and a sum was paid over to residuary legatee, who could be entitled to nothing until after all the legacies had been paid. The trusts to be performed in favour of *Martha* were these:—to invest 150*l.* in Navy 5*l.* per Cents., and to accumulate it at compound interest till *Martha* became of age, which she did in 1835, and she then became entitled to the accumulated fund. *Elizabeth Smith* was therefore bound to make that investment, and to transfer the amount to the Plaintiff and her husband, and *John Smith* also became liable for not having done so during his life. That of itself would be sufficient; but there is more than that, there is specific proof of the receipt by *John Smith* and his wife of a large sum of money, part of the assets, which would have been applicable for the purpose of making the investment for the Plaintiff, he had dissipated or not properly got in the remaining assets. There could be no waiver by the Plaintiff, because she was an infant during the whole of the time, during which this fund ought to have been invested at compound interest.

Then it is alleged, that this demand against the estate of *John Smith* has been satisfied; and the twelfth paragraph of the bill, and the case of *Tyler v. Bell*(a), are relied on for that purpose. It appears to me that this case is perfectly distinct, and does not apply to this. The twelfth paragraph is this:—That *John Smith* died possessed of large personal estate, and his wife and the two Defendants, as his executors, possessed themselves of a part of his personal estate; and on the death of *Elizabeth Smith* the same were possessed by the remaining two executors.]

(a) 2 *Myl. & Cr.* 89.

It then appears, that they distributed his estate in the year 1846. It is said that that is a sufficient payment or satisfaction, because as *Elizabeth Smith* was, after the death of *John Smith*, the sole legal personal representative of the testatrix, and as she received, from the estate of *John Smith*, sufficient to answer the amount due from him to the estate of the testatrix, that creates a discharge. The case of *Tyler v. Bell*(a) is relied on for that purpose; but that was a case where there being a liability on the part of a husband of an administratrix, for which it was admitted his assets would have been liable, he made his wife sole executrix: and the bill alleged, that in her character of sole executrix she had possessed assets of her husband "much more than sufficient to answer the Plaintiff's demand;" and in that state of things the Court said, that there had been a satisfaction. That shews that a repayment by the executor of the husband will discharge his estate, and is a separate and distinct case from this. This is much nearer *Clough v. Bond*(b), which was to this effect:—A son and a daughter were administrators, the daughter being under coverture, a sum of money belonging to the estate was paid into a bankers, in the names of the son and of the husband; the husband died, and the son then applied the fund to his own purposes. The Court held, that the estate of the husband was liable to make good that amount. No doubt, if the money had been transferred into the joint names of the two administrators, after the husband's death, and they had jointly misapplied it, the estate of the husband would have been exonerated and discharged.

In my opinion, therefore, this demand upon the estate of *John Smith* has not been satisfied.

Then

(a) 2 Myl. & Cr. 89.

(b) 3 Myl. & Cr. 490.

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Then it is said, that there must be an account, in order to ascertain whether *Elizabeth Smith* did or did not receive, from the estate of *John Smith*, her husband, sufficient to answer this demand; and that, as that account can only be taken in the presence of her legal personal representative, such legal personal representative is a necessary party for the purpose of ascertaining the fact. In my opinion, the burden of the proof lies on the Defendants and not on the Plaintiff. The liability of the estate of *John Smith* is established, and the burden of proving its satisfaction falls upon the Defendants, who resist that demand and dispute the liability. In my opinion, the facts proved before me do not discharge that liability, and it therefore still remains.

Again, it is stated, that his estate has been administered and wound up in 1846. No doubt that may create a considerable hardship, but if the liability exists, and is neither barred by time nor by the acts of the parties, then, if any part of that estate remains, it is liable to make good all demands upon it, although the parties themselves may, many years ago, have intended to wind it up (a). Upon that part of the case, I am of opinion, that there are no sufficient laches proved against this Plaintiff to disentitle her to any demand upon *John Smith's* estate; in the first place, I find, that when she came of age, repeated demands were made for her legacy which was not a mere pecuniary legacy, but one subject to a special trust which ought to have been carried into effect, so that the money might have been then forthcoming. It is impossible to say that she acquiesced in its remaining in the hands of *James Grantham Smith*, when she could have done no act of acquiescence until 1835, when she attained twenty-one.

I cannot

(a) See *Knatchbull v. Fearnhead*, 3 Myl. & Cr. 122.

I cannot accede to the argument of Mr. *Follett*, that *James Grant Smith* must be treated as an executor of the testatrix, and that all his receipts are to be attributed to him in the character of a legal personal representative, upon the ground that his wife was named as one of the executrixes in the will, for she never proved the will, and ultimately disclaimed; and though it be true, that the probate by one executor of a will inures to the benefit of another, still it does not make the other liable, and no person can be made an executor or executrix who does not choose to act. It may be, that *James Grant Smith* acted as executor *de son tort*, but, looking to his conduct in these matters, I treat him merely as the agent of *Elizabeth Smith* and of *John Smith*, who was the person really responsible for the whole.

In my opinion the estate of *John Smith* became liable for the payment of this legacy during his lifetime, and that liability has never since been discharged. Consequently, this is a debt against his estate, and his assets are liable for its payment.

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**The ATTORNEY-GENERAL v. The Earl of  
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Feb. 7, 8, 11.

When lands are given to charity purposes on the happening of a particular event, there is a resulting trust in the meanwhile; but where real estate was vested in A. in trust, out of the rents, to keep it ready for the reception of plague patients, during their sickness but no longer, and for a burying-place for them, and for no other use, &c., it was held, first, that this was a present gift to charitable purposes, and not merely a gift contingent upon the reappearance of the plague; and, secondly, that there was no resulting trust in the meanwhile for the donor or his heirs, though the plague had not reappeared for more than 180 years.

In taking an account of rents with which a Defendant is charged by the decree, any allowance for lasting improvements can only be co-extensive with the period of accounting.

**B**Y an indenture, dated 7th December, 1687, the Earl of Craven, calling to mind the sad and lamentable visitation of Almighty God upon the kingdom, but more especially upon the cities of London and Westminster, in the year 1665 and 1666, by the pestilence and great mortality, and the great necessity there was for providing a pest house for the sick, and a burying place for the dead, and having then, for the said purposes, hired and since purchased a field, called the *Pest House Field*, situate in the parish of *St. Martin's-in-the-Fields*, and containing about three acres, conveyed the same to Sir William Craven and his heirs, to the use of the Earl of Craven for life, without impeachment of waste, remainder to the use of Sir W. Craven and his heirs, "in trust, out of the rents, issues and profits thereof, to maintain, support and keep, in good and tenantable repair, the houses and buildings in and upon the said field erected and being, and the walls and fences thereof, and the same, so supported, preserved and maintained, for the relief, support, comfort, use and convenience of such of the poor inhabitants of the parishes of *St. Clement's, Danes, St. Martin's-in-the-Fields, St. James, Westminster, and St. Paul's, Covent Garden*, as should thereafter, at any time, happen to be visited with the plague, as a *Pest House* or a place set apart for their relief, and for severing them from the well and

and uninfected, for their use and relief, during their sickness and until their recovery and no longer, and for a burying place for the dead of the said parishes dying of such sickness, and to and for no other use, intent or purpose whatsoever; and also, from time to time for ever hereafter, for and during such times as the said parish, or any of them, should be visited with the plague, permit and suffer the churchwardens and overseers of the poor of the said parishes and of each of them, for the time being, to apply and convert the premises and all the buildings then erected, or which should thereafter be erected upon the same, to the use of such poor inhabitants as should be infected as aforesaid, and for a burying place for such as should die infected as aforesaid, but subject always, to the government, oversight and direction of the said Sir *William Craven*, his heirs and assigns, for the ends aforesaid."

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The *Pest House* Field was never required for the use of persons visited with the plague, or for the burial of persons dying thereof, and after the death of the grantor, down to the year 1732, it continued to be enjoyed by the owners of the *Craven* estate, as part thereof. But in 1732 buildings having been erected on the ground, and rents received in respect thereof, the four parishes interested applied to the Court of Chancery for an injunction, to restrain the erection thereon of any buildings, in the shape of dwelling houses, shops or the like, and insisting on the ground being preserved in its original state.

Thereupon, a compromise was entered into in 1734, and an act of parliament (7 *Geo. 2*, c. ii) obtained, intitled "An Act for discharging a certain Piece of Ground called the *Pest House* Field from certain Charitable Trusts, and for settling another Piece of Ground of equal Extent,

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Extent, and in a more convenient Place, upon the same Trusts," was passed, for carrying the same into effect. This act recited, among other things, the deed of 1687, that there had been no occasion for a pest house or burying ground, that the land and grounds adjoining the field were then built into tenements, generally inhabited by persons of quality, to whom a pest house, if the plague should break out, would be a great annoyance, that if the field should continue as it then was, partly unbuilt, it would be a nuisance to the neighbourhood, and that William third Baron Craven had contracted for the purchase of certain lands in the parish of Paddington, consisting in part of two messuages called Byard's Watering Place (now Bayswater), and three acres of ground adjoining the same; and also recited, that "William third Baron Craven was willing and desirous that part of the land and premises, so contracted for, should be settled and assured for the charitable uses mentioned in the said conveyance of the 7th day of December, 1687, upon the condition, that the Pest House Field should be vested in him, discharged of all the trusts of the first recited conveyance, and had proposed to the respective churchwardens and overseers of the poor of the several parishes intended to be assisted and relieved by the said charity, to set out, assign and allot part of the premises in the parish of Paddington aforesaid, of equal dimensions with and of a more convenient situation than the said Pest House Field for that purpose, and the said churchwardens and overseers accepted the said proposal, and were desirous that the same might be put into execution, but as the Pest House Field could not be vested in William third Baron Craven discharged of the trusts of the first recited indenture of release," without an act of parliament, it was thereby enacted, that Byard's Watering Place and adjoining lands should be vested in "Fulwar Craven

and *William Craven*, their heirs and assigns for  
 pon the trusts and to and for the ends, intents and  
 es thereafter mentioned, expressed and declared  
 concerning the same, and to and for no other use,  
 or purpose whatsoever." And it was thereby  
 d and declared, that *Fulwar Craven* and *William*  
 t, and their heirs, should stand and be seised of  
 the premises thereby vested in them as aforesaid,  
 trust to permit the said *William* third Baron  
 t, and his heirs, at his and their own costs and  
 s, to erect and build, upon some convenient part  
 premises, one or more good substantial brick mes-  
 or messuages, tenement or tenements, of as great  
 ions, and to consist of as many apartments, rooms  
 fices as were delineated and described in a plan  
 on for that purpose, and signed by the said *William*  
 Baron *Craven*, and all or the major part of the  
 wardens and overseers of the poor for the time  
 of each of the said parishes of *St. Clement's*,  
*St. Martin's-in-the-Fields*, *St. James*, *West-*  
*;* and *St. Paul's*, *Covent Garden*, and left in the  
 rooms or houses of those parishes respectively,  
 so to enclose the said piece or parcel of ground  
 good substantial brick wall; and also that they,  
 d trustees, should permit and suffer the said mes-  
 , tenements and buildings so to be erected and  
 und the ground and premises so intended to be  
 d, to be used, occupied, applied and disposed of  
 at house, for the relief, support, comfort, use and  
 ience of such of the poor inhabitants of the  
 s of *St. Clement's*, *Danes*, *St. Martin's-in-the-*  
*St. James*, *Westminster*, and *St. Paul's*, *Covent*  
 n, in the county of *Middlesex*, as should, at any  
 hereafter, be visited with the plague, and to the  
 they might be severed from the well and unin-  
 during their sickness and until their recovery,  
 and

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and no longer, and for a burial place for the dead of the said parishes respectively dying of such sickness, and for no other use, intent or purpose whatsoever; and also in trust to permit and suffer the said messuage called *Byard's Watering Place*, so vested in the said trustees to be, from time to time, used and occupied by such person or persons as should attend the said persons so infected, during the time of such infection; and also that the said trustees should for ever thereafter, during such times as the said parishes, or any of them, should be visited with the plague, permit and suffer the churchwardens and overseers of the poor of the said parishes so visited and infected respectively, for the time being to apply and convert the premises and all the buildings erected and built, or which should thereafter be erected and built upon the same, to and for the use and benefit of such poor inhabitants as should be so infected, as aforesaid, and for a burying place for such as should die of the said infection; but subject always to the government, oversight and direction of the said *Fulwar Craven* and *William Craven* and their heirs." And upon trust that the trustees "should, by and out of the rents, issues and profits of the premises so vested in them," keep the messuages, &c., and walls "in good and tenantable repairs." The act then vested the *Peschoe House* Field in Lord *Craven*, discharged from the charitable trusts.

The premises so limited by the act to *Fulwar Craven* and *William Craven* remained for some time an open piece of ground, but building and repairing leases had since, under powers, been granted by the *Craven* family, of parts of the premises so subject to the charitable trusts, and various dwelling-houses and other buildings had been erected thereon, and the rents and profits thereof

thereof had been received by the *Craven* family, as had been the case with the *Pest House* Field.

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**This** information prayed, that it might be declared, that the premises vested in *Fulwar Craven* and *William Craven* by the act, upon the charitable trusts therein mentioned, had ever since been and still were subject to such charitable trusts; that the boundaries of the premises might be ascertained; that an account might be taken of the rents and profits of the premises, received by the trustees in possession thereof, and that the same might be paid into Court for the benefit of the charity; that new trustees might be appointed, and a scheme settled for the administration of the trusts of the charity; that a receiver of the rents and profits of the premises, subject to the charitable trusts, might be appointed; and that the trustees now in possession might be restrained, by injunction, from receiving the rents and profits.

**On** the part of the *Craven* family, the answer was this:—that, soon after the act passed, a row of one-storied houses had been erected on the premises, which were let, subject to the tenants giving them up at any time on the breaking out of the plague; that these houses had been burnt down, and six villa residences had been erected in their stead; that the land originally granted, as well as that substituted by the act of parliament, had always been considered as part of the *Craven* estates, and enjoyed as such, though subject to be used for a pest house and burying ground, whenever the plague should appear; that in all the leases of the premises a power had always been reserved, to re-enter as soon as the plague should appear, and that the successive possessors were, at all times, ready to give effect to the provisions of the original grant and the act of parliament, had the time for doing so arrived; that every party

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party dealing with the said premises had notice of the trusts; that such charitable trusts had never arisen, by reason that, since the passing of the act, the plague had never existed, in any of the parishes for whose benefit the premises were intended, and until that event occurred, there was a resulting trust for the owners of the Craven estates; that it had been proposed to invest the land in trustees, in trust, when a case should arise when it might become necessary to provide for the objects of the charity, to raise money, by sale or mortgage, for purchasing a pest-house and burial ground, and in the meantime, to apply the rents and profits for the purposes of the charity, and, subject thereto, to pay the same to the parties beneficially entitled to the Craven estates; and an act of parliament had been applied for for that purpose, but had not been obtained; and that in 1854, a proposal had been made, for substituting other land and buildings for those settled in 1734; but before anything had been done, the present information was filed by the Attorney-General, in pursuance of the certificate of the Charity Commissioners.

The Solicitor-General and Mr. T. H. Terrell, for the Plaintiff. This charity is not confined to the plague but may be made available for cases of small-pox or cholera. In cases where a gift has been made to a contingent charity which has never taken effect, the gift does not fail, but has been held to be a gift to charity generally, and the rents are applicable *cy près*; *Attorney-General v. The Bishop of Chester* (a), in which case, a legacy bequeathed by Archbishop Secker, for establishing a bishopric in *North America*, was held valid, though no bishop had as yet been appointed; and ultimately the gift was applied to some charity. So in *Attorney-General v. The Corporation of London*

don

(a) 1 Bro. C. C. 444.

*don (a)*, a trust for the advancement of Christianity in *America*, wanting objects in the province described, did not fail but was appointed *de novo*. And in the case of a gift for the redemption of British slaves in *Turkey* or *Barbary*, there being no British slaves to redeem, nor any object of charity at all resembling the specific object, the gift was applied to the purposes of education and the support and assistance of charity schools in *England* and *Wales*; *Attorney-General v. The Ironmongers' Company* (b). They also cited *Loscombe v. Wintringham* (c); *Williams v. Kershaw* (d); *Martin v. Margham* (e).

Mr. Roupell, Mr. Giffard, Mr. Selwyn and Mr. Allnutt, for the several parishes, in the same interest as the Plaintiff.

Mr. R. Palmer and Mr. Wickens, for the Craven family. The original donor, the Earl of Craven, directed, that after his own death, the income of the property should be applied in keeping the buildings thereon in a fit state, for the use and relief of such of the poor of the four specified parishes as should be visited with the plague, during their sickness, and till their recovery and no longer, and the property was also to be used as a burying place for the dead of the same parishes dying of such sickness, and to and for no other use, intent or purpose whatsoever. The property therefore is subject and liable to be used as a pest house and burying ground whenever the plague shall re-appear; but until the plague shall so re-appear, there is a resulting trust in favour of the donor and his heirs, or those claiming under or through him. The object of the gift was not a general charitable purpose, but a particular purpose, contingent

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(a) 3 Bro. C. C. 171.  
(b) 10 Cl. & F. 908; Cr. & Ph. 208; and see S. C. 2 Beav. 313; 2 Myl. & K. 576.

(c) 13 Beav. 87.  
(d) 5 Cl. & F. 111, n.  
(e) 14 Sim. 230.





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contingent upon a certain event, which has not happened; if it should ever happen, the trust will then arise. The application of the rents and the mode of dealing with the property have been, from 1687 to the present time, the same as now, and have proceeded along upon the footing, that if ever the plague should re-appear, the property should be applied for the benefit of the poor of the four parishes as directed by the gift. They cited *Attorney-General v. The Bishop of Oxford* (a); *Attorney-General v. Boulton* (b); *Attorney-General v. Goulding* (c); *Corbyn v. French* (d); *Attorney-General v. Whitchurch* (e); *Moggridge v. Thackerwell* (f); *Mills v. Farmer* (g); *Stansfield v. Habergham* (h); *Habergham v. Vincent* (i); *Attorney-General v. The Mayor of Bristol* (k); *Cherry v. Mott* (l).

*The MASTER of the ROLLS* reserved judgment.

Feb. 11. *The MASTER of the ROLLS.*

This case turns on the construction of the act of parliament. Undoubtedly, where there is any obscurity in the act of parliament regulating a charity, you may refer to the original endowment to remove that obscurity. I am of opinion, that, on the construction of these documents, the land in question is held in trust for charitable purposes. To this extent I concur in the argument of Counsel that, if the gift to the charity be really a springing use, that is, if the gift to charity is not to take effect until a particular event occurs, a resulting trust exists in favour of the donor and his heirs, until the charity arises; and, therefore, as far

(a) 1 Bro. C. C. 444, n.

(b) 2 Ves. jun. 380.

(c) 2 Bro. C. C. 428.

(d) 4 Ves. 418.

(e) 3 Ves. 141.

(f) 7 Ves. 36.

(g) 19 Ves. 485; S. C. 1 A. 55.

(h) 10 Ves. 273.

(i) 2 Ves. jun. 204.

(k) 2 Jac. & W. 294, 313.

(l) 1 Myl. & Cr. 123.

at argument goes, I am in favour of the Defendant, and think that he is entitled to the full benefit of it. If, therefore, the proper construction of this act of parliament is this:—that no charitable trust is imposed on the property until the plague shall appear in this country, I am then of opinion, that there is a resulting trust in favour of the donor and his heirs, and that they are entitled to the profits arising from the property until that event arises. I say the act of parliament, because it regulates this case, though, no doubt, the deed may properly be referred to, but only, as I have stated, for the purpose of construing any portions of the act of parliament which may be ambiguous or obscure in themselves. But my opinion is, that, in fact, there is no substantial distinction between the deed of 1687 and the act of parliament.

I now proceed to examine both of them for the purpose of ascertaining what are the trusts affecting this land. The trusts imposed by the deed of 1687 were these:—In the first place, during the life of the Earl, the donor, he reserved to himself the life interest, with full power to deal with the lands as he pleased; and, subject to that, upon his death, the trust was not merely to devote the land to the purpose of relieving persons infected with the plague, whensoever the plague should arise, but it created a present trust, in the meantime, and before that event arose, to preserve the land in such a state, that it might be proper for the reception of persons who might be infected with the plague.

In my opinion, the words are clear. I think there are two distinct trusts specified in this deed: one of them is, to preserve the property in a state ready at any time to receive patients, and the other is, to receive the persons infected, when the plague should arise.

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If that be the true construction, it appears to me impossible to say, that there was not always a present existing charitable trust. It is a present existing charitable person, having followed all the formalities prescribed by the Statute of Mortmain, gives land to trustees to be preserved in the particular state required for any particular charity, whensoever that particular thing shall arise, and directs that it shall be applied to no other purpose whatsoever. Now, what are the words? [*His Honor read them.*] There is nothing whatever to shew that that is to be done at a future remote period; on the contrary, it is to be done from and after the death of the Earl. The property is therefore immediately to be supported, preserved and maintained in such a state, that it may be applied for the relief and support of the poor visited with the plague, and as a place set apart for them, and severed from the well and uninfected part of the community, and "for a burying place for the dead." Suppose it had ended there; there would have been a complete, perfect, distinct and separate trust for preserving this land always for that purpose.

The next is this : [*His Honor read the passage, p. 393*] There is a separate trust, that is to say, whenever the occasion should arise, to allow the parishes immediately to apply the premises for the benefit of the poor of those parishes. The first trust is, to preserve it in a fit state for the parishes, in fact, to preserve it as a pest hospital, and to do this out of the rents and profits of the lands: and whenever the plague should appear, to allow the poor to be taken there.

It is obvious, that the trusts would have been completely defeated, if the property were allowed to be built over. It would no longer be a building proper for the reception of the poor infected with the plague, or for the use of the poor.

they be kept severed from the "well and unin-  
l" portion of the community.

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was argued, that the expression "houses to be  
ad thereon" shewed, that the donor contemplated  
fresh houses should be built there. That is not  
material, because it is made perfectly clear by the  
f parliament; but even on this, I should consider  
it referred either to such buildings only as the  
himself should put on it during his lifetime, which  
ad the power of doing, or to any reinstatement  
ny proper pest house itself; that is to say, the  
ital for infected people, if that should become  
sary, at any future period. What took place in  
is not a matter of very great importance; but,  
r as it goes, it confirms the view which I take of  
case. I think the parishes took a correct view  
re construction of this deed, when they gave in-  
tions, in 1732, for an application to the Court of  
cery, for an injunction to restrain the erection of  
buildings, in the shape of dwelling-houses, or  
s, or the like. In fact it was, in my opinion, a  
sh of trust, when any houses whatsoever were  
upon it; for, by no possibility, could the trusts  
nally prescribed by the original deed be carried  
effect, if fresh houses were built upon the land.

is also to be observed, that in the original deed, no  
ts are spoken of at all, except rents and profits to  
plied for the purpose of keeping it in repair. It  
e it says "out of the rents and profits." In that  
ct there is a very slight variation between the deed  
the act of parliament. It says "out of the rents  
profits;" and it seems to anticipate, that all the  
s and profits would be required for that purpose, for  
ressly directs that they shall be employed for no

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other purpose whatsoever. If it were supposed that the place could only be inhabited by a surgeon and by such attendants as would probably be required, for the purpose of tending the sick when the plague arose, the rents derived from the property and from the depasturing of the land would not, in all probability, be more than sufficient (at all events in the early time) for the purpose of duly preserving the buildings, then erected on the three acres, in such a state as would make them fit for the reception of infected poor persons.

Now what took place in 1732 was this:—the parishes gave directions that a bill be filed in Chancery, for an injunction to restrain the building of any houses upon it; and thereupon Lord Craven entered into a compromise; he had negotiated long before, but he now entered into a compromise with the parishes, which was carried into effect by means of an act of parliament. It is important to observe what their claim was at the time this compromise was entered into. The claim which was made by the parishes was this:—that Lord Craven was bound to preserve the land exactly in the state in which the Earl left it, except so far as might be necessary to keep the pest house and buildings in repair. They dispute the right to erect any building whatever on the premises and to settle that matter, the act of parliament was passed, which transferred the trusts to the three acres at Craven Hill at Bayswater. Before I proceed to inquire what those were, it is important to observe, that the Craven family have been doing exactly the very thing at Bayswater, the right to do which was contested at Carnaby Market, and to avoid the determination of which question and for the benefit of the Craven family, the act of parliament was passed, transferring the trust to another place.

I throw

**I** throw out of consideration, therefore, as a matter, in my opinion of no moment, the fact, that very considerable rents were actually received between 1722 and 1732, when Lord *Craven* was doing that which the parishes contested his right to do; namely, building houses, and erecting shops, and doing various matters which were beneficial for the owners of the land.

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**Then** the act of parliament passes. It recites exactly what had taken place; it recites the original deed, it recites the acts which have occurred, it makes a long recital with respect to the property to be taken in exchange. Then it proceeds thus: it recites that—[see page 394]. There is, therefore, a recital, that the intention was to put this new piece of land exactly in the same situation as the old, and certainly the act of parliament appears to me to have done so. If I am right in the construction which I put on the original deed, the first trust imposed on it was, to preserve it always in a fit and proper state for the instantaneous reception of persons infected with the plague. Thereupon there is a conveyance of this property to the uses following [see page 395]. It was thereby enacted and declared, that the trustees and their heirs “should stand and be seised of and in the premises thereby limited in use to them as aforesaid, upon trust,” to do what—[His Honor read the passage, ante, p. 395]. In fact, following the words of the original deed. That appears to me, again, to be a plain trust, arising the moment the act of parliament passed, and that the land was vested in the trustees, to keep it and preserve it in a state for the reception of persons infected by the plague and for no other purpose whatsoever, that is to say, to have built on it such a building as was agreed on for that purpose, which should be a fit and proper hospital for the reception of persons infected by the plague, and

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and a proper place for the residence of medical officers, and then surrounded with a precinct, not connected with any adjoining houses but inclosed by a wall, and set apart, so that they should be separated from the rest of the community. That was the original and first trust which was imposed on it. Then it goes on exactly in the same words—[see page 396]. There is nothing there to limit the use and occupation thereof to the time of infection. It is for the use and occupation of the persons who are to attend to them during the time of the infection, but the apparent and obvious meaning is, that it was to be applied for the use of persons, who were to be resident in it and ready to attend to persons at the time of the infection, whenever it occurred. Then comes the next trust: "And also that they the said trustees should for ever thereafter, during such times as the said parish or any of them should be visited with the plague, permit and suffer the churchwardens" to convert the premises for the purpose of the poor who were infected with the plague [see page 396].

Supposing that as soon as this act had passed, Lord Craven had covered this place over with houses, it is obvious that the first trust would have been completely destroyed, and the object of having a place ready for the reception of persons infected with the plague, and severed from the rest of the community, could not have been carried into effect.

It is to be observed also, that this land is vested in trustees to permit Lord Craven to build these particular specified buildings upon it, and for the other specified purposes, but "for no other purpose whatsoever." By what reasonable or fair construction can it be contended, that when it is directed, that the trustees shall permit Lord

*Craven* to put a building of a particular description it for certain purposes, and "for no other use whatsoever," they can, without a breach of covenant permit Lord *Craven* to cover it all over with other buildings, for his own use and benefit.

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It is obvious, that this very thing which the *Craven* have been doing, with respect to this piece of land at *Bayswater*, is the very thing the right to do was contested with respect to the three acres at *by Market*, and which (for such appears to me to be the effect of the compromise) it was admitted they had the right to do, and therefore it was transferred to that piece of land, in order that such other piece of land might be duly preserved for the charity.

I have before stated, I go along with the Defendant's Counsel to this extent:—that if this land had been devoted to trusts for the purpose of erecting an hospital, and devoting it for these purposes, when and as the plague appeared, my opinion would have been that there was a resulting trust in favour of the hospital and his heirs; but, in my opinion, here was an immediate trust, directing its immediate application, and preserving it in a state for the purpose of reception of persons infected with the plague, and for other purpose whatsoever.

It is also to be observed, with respect to the application of the rents, the expression is a little more strong in the deed than in the deed. In the deed, it is "out of the rents," and here it is "by and out of the rents." Do not think that any thing turns on that; because, in my opinion, the expressions are equivalent in both. In fact, it is, in my opinion, a direction for the application



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application of the whole of the rents; and there is direction whatever that any surplus or residue should be applied in any other manner.

It is obvious, that if I am right in this view of the case, the authorities which have been cited do not apply to this particular case. In the case of *The Attorney-General v. Whitchurch (a)*, which is a leading case on the subject, land was given to a particular charitable purpose which could not be carried into effect. The Court held, that it was not given to purposes of charity, but that the whole failed. Not only do I concur in that decision, but I have, on several occasions, expressed my approbation of that view of the law; and I am certainly prepared to follow it. But who can say, when this deed was executed or the act passed, that this was not a charitable trust capable of being performed:—to preserve land, with an hospital on it, in such a state, that should be fit for the reception of persons ill of the

plague, if the plague should ever occur; and if it were ever wholly devoted to charity, those cases do not apply. But it appears to me that if this were a present gift, it is a distinct charitable purpose capable of being carried into effect. No doubt if the plague had occurred as frequently subsequent to 1665 as it had done previously, or if it had occurred more frequently, as at intervals of every twenty years, no question whatever would have arisen, but the land would always have been preserved in a state for the reception of persons infected with the plague, and when the plague appeared, they would immediately have been taken to this place. In fact it is only the interval of some one hundred and ninety years which has occurred since the plague last appeared in this country, that has raised any questions whatever

(a) 3 Ves. 141.

whatever about it. Who can say that the disease, properly speaking, called the Oriental Plague, may not occur again? I go into no speculations of what constitutes plague or not, for I take the expression in the strictest possible sense for the benefit of the Defendant, and say, that it means the Oriental Plague, as it was known when it visited this country in 1665; but can anybody say that it will never arise again? It is obvious that the first trust, in my view of the case, has been completely neglected, by the present state and condition of this property, and that it would be utterly impossible, if the plague were to break out at the present moment, instantaneously to convey a set of infected persons to any place on this ground fit to receive them, and have them properly attended to. In my opinion, the first trust was to preserve this land in such a state, that this might be done, and to apply the proceeds of the land for that purpose.

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Undoubtedly, as it appears to me, the proposal made by the *Craven* family, or by the Earl of *Craven*, which as mentioned, would not have satisfied that condition at all. If I am right in the view I take of this case, the parishes were entitled to the three acres in *Carnaby* Market, and they were entitled to have them preserved in that state, unless it was found, that by the power of this Court, it might be applied for a similar purpose in a more beneficial manner; but that land was entirely devoted to charity. By a compromise, sanctioned by the legislature, they substituted three other acres for that purpose. Those three other acres have been applied by the *Craven* family exactly in the manner the right to do which was disputed, and, in my opinion, properly disputed, at an early part of the last century. Is the same thing to go on, by the substitution of a fresh

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fresh piece of land ; because it is obvious that it would be merely giving a piece of land nominally. It would be gradually getting further off from the parishes, and it would be gradually getting covered with buildings, and it would never be in a state in which it could be applied for the reception of the infected poor : and to contend that the trust is satisfied by telling persons who take houses there, that they are to go out at a moment's notice, if persons are brought there infected with the plague, is simply idle, for there could be no possibility of enforcing such a contract, if entered into.

Having arrived at the conclusion that the whole of this land was devoted to charity, from the termination of the life of the first Earl *Craven*, and that it is so devoted at this moment, the next question is, in what way it is proper to apply it. The point which I have determined is this :—that the interest of the *Craven* family in this land is nothing, that they are entitled to no benefit in it whatever, but that the whole of it belongs to the charity. The next question is, how it is to be best applied to carry into effect the objects of the founder, and whether that would be best performed by restoring the ground to what it was before, that is to say, making a waste of the three acres at *Bayswater* and *Craven Hill*, with the pest house in the middle, or whether it would be better employed, for the real purpose of the founder, by taking the property and employing it for the erection and foundation of an hospital, in some convenient situation, for the reception of persons who might be infected with the plague (if ever the event should arise), and in the meantime, for persons who are afflicted with any infectious or contagious disorder.

That is the general view I take of this case, and therefore I propose to make such a declaration, as will  
 enable

enable the Defendants to take the opinion of a superior Court, by wholly excluding their interests, and to declare that, in my opinion, the whole of the land is devoted to charity. I will then refer the matter to Chambers, to consider in what manner the trusts of the founder can be best carried into effect, or as near thereto as may be.

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I must direct an account of the rents of the property from the time of filing the information. I presume that Counsel will not ask for any directions respecting lasting improvements. If they do, they are entitled to it; but any allowance for lasting improvements can only be for such as were made during the period of accounting for the rents.

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The clauses of "The Waterworks Clauses Act," 1847, are applicable to "lands and streams," in the same manner as those of "The Lands Clauses Consolidation Act" are applicable to "lands;" and in the mode of compensation, the same distinction is taken between "lands and streams taken and used" and "lands and streams injuriously affected."

The diversion of a stream is a "taking and using it" within the meaning of the 85th section of the Lands Clauses Consolidation Act, which is incorporated in the Waterworks Clauses Act, and before such diver-

sion can be made, the value of the stream must be ascertained and secured to the owners of the land through which it passes.

Whether by diverting a stream, the river into which it used to flow is "injuriously affected," or "taken and used," *quære*.

### FERRAND v. The Corporation of BRADFORD.

THIS was a motion for an injunction, to restrain the corporation of *Bradford* from diverting or continuing to divert a natural stream called the *Swain Royd* stream, or taking or using any of the water thereof, until the purchase-money or compensation should be ascertained and paid, or such deposit, by way of security, made, and such bond given, as required by the 85th section of the Lands Clauses Consolidation Act, 1845 (a), and, until all questions, as to reserving some part of the water for domestic and agricultural purposes (other than irrigation) should have been settled.

The *Swain Royd* stream, after flowing through lands not belonging to the Plaintiff, enters his lands, which are situate in the neighbourhood of *Bradford*, below a place called *Swain Royd Bottom*, and continues to flow through them, either under the same name, or under the name of the *Cottingby Beck*, until it enters the river *Aire*.

By the 5 & 6 Vict. c. vi, the *Bradford Waterworks Company* was incorporated and authorized to construct works for supplying the town of *Bradford* with water. By the *Bradford Waterworks Act*, 1854 (17 & 18 Vict. c. cxxix), the company was dissolved, and the acts relating

(a) 8 & 9 Vict. c. 18.

lating to it repealed, and it was thereby enacted, that  
 "the Companies Clauses Consolidation Act, 1845 (a),  
 (except the provisions as to conversion of borrowed  
 money into capital,) the Lands Clauses Consolidation  
 Act, 1845 (b), and the Waterworks Clauses Act, 1847 (c),  
 should be incorporated therein; that the proprietors of  
 shares, &c., in the dissolved company should be incorpo-  
 rated by the name of the *Bradford Waterworks Com-  
 pany*; and the estates, rights, privileges and liabilities of  
 the old company should be vested in and binding on the  
 new company. That it should be lawful for the new com-  
 pany to construct waterworks and alter, &c. the same,  
 in the line and on the levels, and upon the lands de-  
 lineated on the plan and sections, and described in the  
 book of reference deposited with the clerk of the peace  
 for the *West Riding* of the county of *York*, and to enter  
 upon, purchase, take, and use, such of the lands,  
 buildings, streams and waters, mentioned in the plan  
 and book of reference, as should be necessary, or to  
 agree for and take a grant of any easement, right, &c.,  
 over the same, and to take from such streams of water  
 as the company might require: provided always, that,  
 in constructing, &c., the works, the deviations should  
 not exceed the limits shown on the plan, and three feet  
 from the said levels." The act then, after reciting  
 (section 128) that the *Swain Royd*, thereby authorized  
 to be appropriated, flowed through the estates of the  
 Plaintiff till it fell into the river *Aire*, enacted, that the  
 company should make compensation to the Plaintiff for  
 the diversion of the stream, such compensation, if not  
 ascertained and paid within one calendar month from  
 the commencement of such diversion, to bear lawful  
 interest till paid; and in case any difference should  
 arise touching the amount of such compensation, or as  
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(a) 8 & 9 Vict. c. 16.

(b) 8 & 9 Vict. c. 18.

(c) 10 & 11 Vict. c. 17.

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to the necessity of reserving, for the domestic and agricultural purposes of the Plaintiff's estates, other than irrigation, a portion of the waters of the stream, as therein provided, the amount of compensation and quantity (if any) should be ascertained as provided by the Lands Clauses Consolidation Act, 1845, for settling cases of disputed compensation.

By the *Bradford Corporation Waterworks Act, 1854* (17 & 18 *Vict. c. cxxix*), the *Bradford Waterworks Company* were authorized to sell the works to the corporation of *Bradford*, and, on the execution of the conveyance, all their powers, authorities, rights, privileges and liabilities were to be vested in and binding on the corporation.

A subterraneous conduit, leading from another spring to the waterworks, passes under the *Swain Royd stream* at *Swain Royd Bottom*, above the place where the stream enters the Plaintiff's lands. Previous to 1855, the *Bradford Waterworks Company* diverted the water of the *Swain Royd stream*, by means of a channel or culvert, opened through the bank and passing into the conduit, nearly at the point where the *Swain Royd stream* passes over it. This diversion was made with the consent of the Plaintiff; and the company were bound, by a written agreement dated 22nd *October, 1852*, on the determination thereof by the notice as therein mentioned, to restore the stream to its original channel, and replace the banks in their original state. On the 5th of *August, 1854*, the Plaintiff gave notice to determine the agreement, and the culvert was stopped up in *June, 1855*.

In 1855, the corporation opened negotiations with the Plaintiff for the purchase of the *Swain Royd stream*, which were broken off in *November* of that year.

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On Saturday, the 22nd *December*, 1855, the town clerk wrote to the Plaintiff a letter, stating, that the corporation had determined to divert the *Swain Royd*, and that the water would be taken into the conduit at the end of the ensuing week, and that the Plaintiff should be informed of the exact time when the appropriation would take place, in order that the interest upon the compensation to be awarded to him might be computed fairly; and, on the same day, he sent the Plaintiff another letter to the same effect, and also a similar letter to the Plaintiff's agent.

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On Monday, the 24th *December*, the corporation, without further communication with the Plaintiff, diverted the whole of the stream into the conduit, and no water of the stream had since flowed through the Plaintiff's lands. This diversion was also made at a point below the limits of lateral deviation allowed by the act, and was, therefore, more injurious to the Plaintiff by intercepting water of which he would otherwise have had the benefit. On the 25th *December*, the Plaintiff's agent wrote a letter to the town clerk, disputing the right of the corporation to divert the streams, without complying with the provisions of the Lands Clauses Consolidation Act, incorporated in the Waterworks Clauses Act.

The corporation, on the 27th *December*, served the Plaintiff with notice, that the stream was required for the purposes of the act, and requested him to deliver a statement of the interest claimed by him within twenty-one days, and if not or if an agreement could not be made, they would issue a warrant to summon a jury to assess the amount. A correspondence then took place, but with no result, and the Plaintiff filed his bill and now moved for an injunction.

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injuriously affected by the undertaking, and in and 85th clauses as to the determining and deposit in the Bank the purchase-money or compensation giving the bond thereby required, were referred to the notice given by the town clerk to the Plaintiff, the 27th *December*, was objected to as irregular. 6th section of the Waterworks Act, in which the "lands and streams" are used in place of the correcting word "lands" in the Lands Clauses Consolidation Act, was also referred to, as were also the 41st, 43rd and 128th sections of the *Bradford Waterworks Act*.

Mr. *R. Palmer* and Mr. *H. Cadman Jones*, in support of the motion, contended, that the stream, being a natural stream, the Plaintiff had a right, subject to the provisions of the several acts of parliament, to have it in its natural state. That if the Defendants required to take and use the stream for the purposes of their works, their proper mode of proceeding to effect their object was clearly pointed out to them by the 6th section of the Lands Clauses Consolidation Act, incorporated in the *Bradford Waterworks Act*. That the 84th section of the Lands Clauses Consolidation Act prevented the promoters of an undertaking from entering the lands of any person without his consent, and that the provisions of the 85th section had been complied with.

the words "lands and streams" being used in the latter, instead of "lands" in the former. That the Defendants not having done so, ought to be restrained by the injunction of this Court.

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Mr. Lloyd and Mr. Currey, *contrà*. The Corporation of *Bradford* have no private purpose to serve, but the rights, privileges and duties given to and imposed upon them are vested in them for a public purpose, which they are bound to carry out. [*The MASTER of the ROLLS*. The question is, does the Lands Clauses Consolidation Act apply—if it does, why not follow it.] The 84th and 85th sections of that act are inapplicable to water; water is not a hereditament. [*The MASTER of the ROLLS*. I can see no difference between it and a right of way.] Besides, those sections are modified by the 128th section of the *Bradford Waterworks Act*, into which they were incorporated, and this section gives special directions as to the Plaintiff's compensation. This case in fact rather comes under the 65th section, by which provision is made for ascertaining the compensation to be paid for lands taken by the promoters, for which "they should not have made any compensation." Then there is a difference between the cases of lands taken, and lands injuriously affected; and in the latter case it is not obligatory on the promoters to give compensation before the lands are injuriously affected; *Hutton v. The London and South Western Railway Company* (a); *Lister v. Lobley* (b); and that is this case. Besides, a great deal of public injury may be done by stopping the diversion of the stream, without any corresponding benefit to the Plaintiff, and that is always considered; *Hare v. The Cork and Bandon Railway Company*

(a) 7 *Hare*, 259.

(b) 7 *Ad. & Ell.* 124; 6 *Nev. & M.* 340; 2 *Har. & W.* 122.

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pany (a). Then as the stream may be taken the whole way down to the river *Aire*, the Defendants (if the Plaintiff be right in his contention) must arrange with all the owners, and even the proprietors along the *Aire* may be injuriously affected, and may also seek for compensation. On the cases of *Hare v. The Colne and Bandon Railway Company*, and *Hutton v. The London and South Western Railway Company*, in which it is submitted the injunction ought to be refused.

The MASTER of the ROLLS.

I am of opinion, that the Plaintiff is entitled to an injunction in this case. Probably, there is something in this case, which does not appear before the Court, which has led to a discussion which, in the result, appears to be rather an idle one. But I am bound to decide on my view of the construction of the acts of parliament, and the rights of the parties; and I will explain the view I take of the construction of them.

The case of *Hutton v. The London and South Western Railway Company* (b), is undoubtedly law, and I should follow it if I thought it applied to this case; but, in my opinion, there is a distinction between the two cases. The distinction taken in that case is very applicable to the present. If, for the purpose of the undertaking and in making the works, the promoters wish to take the property of another person, they cannot do so, except by agreement and permission; or, having ascertained the value of it, and made the deposit, or giving a bond according to the condition specified by the 85th section of the act of parliament. When they are once in possession of the land, if they do anything which injuriously affects the land of other persons,

(a) 17 L. T. 21.

(b) 7 Hare, 259.

persons, then, undoubtedly, they are not to adopt that same course, but when the amount of damages has been ascertained, it must be paid by the persons who cause it. But by this clause the Lands Clauses Consolidation Act is made a part of this special act of parliament, as far as it is applicable; but not merely that; the Waterworks Clauses Act is also made a part of this act of parliament for the same purpose. Now the Waterworks Clauses Act re-enacts the clauses of the Lands Clauses Consolidation Act, *totidem verbis*, but with this addition, that it introduces the word "streams" as well as the word "lands." Now observe how that alters the case: it enacts "that they shall make to the owners and occupiers of, and all other parties interested in any lands or streams, taken or used for the purpose of the special act or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation for the value of the land and streams so taken or used, and for all damage sustained by such owners, occupiers or other persons, by reason of the exercise, as to such land and streams, of the powers vested in the undertakers by this or the special act or any act incorporated therewith." Now this clause expressly makes the same distinction with respect to the streams, which the Lands Clauses Consolidation Act does with respect to lands, that is to say:—if you take the stream you must pay the whole price of it, if you injuriously affect the stream, then that clause does not apply. But when you have injuriously affected the stream, compensation in damages must be made, in accordance with the ordinary mode: so that the distinction is quite clear.

It is suggested, that this stream may be taken the whole way down to the river *Aire*. No doubt it may,

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and, accordingly, all the owners of the stream whole way down, whoever they may be, must receive full compensation for their property which is taken. It appears in the present case, from the affidavits, that the Plaintiff is really the only occupier (with a very small exception) of the land the whole way down the river *Aire*. It is then suggested, that you must compensate to all the proprietors of the river *Aire*. This clause meets that very objection; and it is exactly the distinction taken in the case of *Hutton v. The London and South Western Railway Company*. You may injuriously affect the river *Aire*, and if so, you must make compensation to all the persons injuriously affected thereby but you do not take the river *Aire* but this particular stream, which is the exact distinction specified by the Waterworks Clauses Act, for the purpose of making that applicable to streams which the Lands Clauses Consolidation Act makes applicable to lands, and then on that being done, the Lands Clauses Consolidation Act applies.

Now to illustrate it in the present case, supposing this company, by agreement with the Plaintiff, had taken the principal part of this stream, or taken much of it as they required, and had afterwards done something which injuriously affected the remainder of the stream, then *Hutton v. The London and South Western Railway Company* would have applied, and then he could not have come for an injunction to restrain them from producing this injurious effect; but here the Defendants, in the creation of the work, by taking the stream itself, they are doing the very thing which the 6th clause of the Waterworks Clauses Act says they shall not do, without making full compensation to all the owners of it or occupiers of it, unless by agreement. That, in my opinion, is exactly this case.

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Then it is suggested to me, that a great public injury **might** be done by stopping the diversion of this stream. **But** the argument comes ill from the mouth of the *Bradford* Corporation, who say, that the course to be **taken** by the Plaintiff is very easy, for he has nothing **to do** but to ascertain the amount of damage and give **them** notice of the amount, and that in twenty-one **days**, if they do not take steps to assess it, they will **be obliged** to pay it. Their case on the affidavits is, **that** they themselves have not adopted and cannot **take** this course, because the damage cannot be ascertained until it is done. But if he can ascertain the **damage**, so can the corporation, and they might at any **time** before the hearing of this motion if they had **thought** fit, have ascertained what the amount of **damage** was, and either have deposited it or have **given** a bond for the payment of the amount. But yet, in **spite** of that, from some sort of feeling between these **parties**, which it is impossible for me to understand, and of **which** I know nothing, this case has been brought **into Court** and argued for the most unnecessary purpose **that** can be conceived, it being obvious that some such **course** as that must ultimately be taken. I can only **deal** with the case, however, as it comes before me; and **upon** the legal construction which I put on the **act** of parliament, the Plaintiff is, in my opinion, **entitled** to the injunction.

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(No. 2.)

Feb. 8.

The Plaintiff having, by a slip, neglected to file a printed bill within fourteen days, in pursuance of his undertaking, was relieved from the consequences upon payment of the costs of the motion.

A written bill was taken off the file, the Plaintiff having omitted to file a printed copy within the fourteen days prescribed by the 15 & 16 Vict. c. 86, s. 6, and the 3rd General Order of the 7th of August, 1852. It being proved, that the omission was a mere slip, and that printed copies of the bill were in Court and in the hands of Counsel, at the hearing of a motion for an injunction within the fourteen days, the Court ordered that the written bill should be restored to the file, and that the printed copy should be received at the Record and Writ Clerks' Office and filed as of the 2nd of February. The costs of the motion were ordered to be paid by the Plaintiff to the Defendant, and, notwithstanding the General Order, no costs of suit were to be taxed.

IN this case, a written copy of the bill was filed on the 19th of January, 1856, with an undertaking annexed to file a printed copy within fourteen days as provided by the 15 & 16 Vict. c. 86. A motion for an injunction was made by the Plaintiff on the 24th of January, which stood over by consent till the 31st, when an order for an injunction was made, which had since been duly drawn up, passed and entered. At the hearing of the motion, a printed copy of the bill was provided for the use of the Court, and printed copies were previously furnished to the Defendants' solicitors or agents, and were delivered to the Plaintiff's Counsel, for whom no written briefs of the bill were made.

The fourteen days allowed for filing the printed bill in this cause expired on the 2nd of February, and no printed copy having been filed, the Clerk of Records and Writs took the written copy of the bill off the file, in pursuance of the 3rd General Order of 7th August, 1852 (a). On Tuesday, the 5th of February, a printed copy of the bill was presented at the Record and Writ Clerks' Office for filing, but refused as being too late.

The clerk of the Plaintiff's solicitors, who had the conduct of the suit, stated by his affidavit, that owing to

(a) *Ordines Can.* 462.

to the illness of one of the firm, it had become necessary to transfer one of the managing clerks of the chancery department to supply his place. This and the illness of the head clerk of that department had occasioned a pressure on the department, and hence, though it was his duty to have filed the printed copy, he had omitted or overlooked so to do.

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A motion was now made on behalf of the Plaintiff, by special leave of the Court, given on the 5th for the 7th of *February*, that the Plaintiff might have until the 11th of *February* to file a printed copy of the bill, and that the Clerk of Records and Writs might restore to the file the written copy of such bill, filed on the 19th of *January* last, and that such printed copy, when so filed, might be treated as having been filed on the 2nd of *February*, and that all proceedings and orders taken and made in the cause might be as valid and effectual, as if the printed copy had been filed on such 2nd day of *February*.

Mr. *R. Palmer* and Mr. *H. Cadman Jones*, in support of the motion, contended, that the omission to file the copy, being a mere slip, the Court ought to grant the indulgence asked. [*The MASTER of the ROLLS*. I have been considering the case, and I think if it is a mere slip, the Plaintiff ought, on payment of the costs, to be allowed to mend it. If I did not allow this, the only consequence would be this: that the Plaintiff would put the same bill on the file to-morrow, renew the motion for an injunction the day after, and reswear all the affidavits. What struck me was this:—the bill was really printed, and copies were in Court at the time the motion was heard. The only question is, whether the General Order of the Court is imperative on me, so that I cannot order the bill to be filed *nunc pro tunc*.]

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One of the same series of Orders (No. xlv) relates to the power of the Judge, and it says expressly, "that the power of the Court to enlarge or abridge the time for doing any act or taking any proceedings in any cause or matter, upon such, if any, terms as the justice of the case requires, is unaffected by these Orders," and therefore, if the Court thinks fit to enlarge the time, it may do so. Suppose the solicitor on the record had died, would be impossible, if he had been personally attending to the business, that the thing could be done. [The MASTER of the ROLLS. It is not an enlargement of the time which is required, for the time has gone by, it is to make a special order respecting the matter. The omission might have been occasioned by some sudden illness of the person who had the charge of the suit, but here there was a mere slip.]

Mr. Lloyd and Mr. Currey, for the Defendants. The question is one rather of jurisdiction and power. If the Court thinks it has jurisdiction to make the order asked, the question would be, what order should be made with regard to the costs; because the 3rd General Order of the 7th August, 1852, has given the Defendants in the suit a vested right to the costs of it. They now have what is equivalent to an order, to be paid all these costs of the suit. The words are (a), "and the Plaintiff in the suit, or his solicitor, who shall have personally undertaken to file such printed copy, shall pay to the Defendant all the costs incurred by him in the suit, such costs to be taxed by the Taxing Master, without further order, upon production to him of the certificate of the Clerk of Records and Writs that a printed copy of the bill has not been filed pursuant to such undertaking, and to be recoverable in like manner as costs ordered to be paid

(a) *Ordines Can.* 462.

paid by a party in a suit to another party in a suit are now recoverable." If then the order now proposed to be made were an order *nunc pro tunc*, the 3rd General Order would have effect; and under the General Order, there is now a direction for the Defendant's costs to be taxed and paid. There ought therefore to be an application to discharge the existing order.

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The MASTER of the ROLLS.

I do not mean the costs of suit to be taxed and paid. I do not know in what form the order ought to be made; but I mean it to be treated in the same way as if the bill had been filed on the 2nd *February*. I was in hopes that an order would be taken by consent, and that I should have been relieved from any difficulty; but that not being so, I must take the responsibility on myself, and make the order. I think I have power to do so. The Defendants must have the costs of the motion.

It was ordered, that notwithstanding the time limited by the General Orders of the 7th day of *August*, 1852, had expired, the written bill filed on the 19th day of *January* last, which had been taken off the file, pursuant to that order, should be restored to the file, and that a printed copy of the bill should be received and filed as of the 2nd day of *February*, 1856; and it was ordered, that the Plaintiff should pay unto the Defendants their costs of this application; and, notwithstanding the General Order, no costs were to be taxed or paid to the Defendants, by reason of a printed copy of the bill not having been actually filed on or before the 2nd day of *February*, 1856.

NOTE.—The Defendants appealed, but the decision was affirmed by the Lords Justices on the 19th of *February*, 1856.

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FORD v. The Earl of CHESTERFIELD.

(No. 3.)

Feb. 22.

In an administration suit, all proper and necessary parties have their costs prior to the administration of the fund. But in suits by mortgagees to ascertain priorities upon an estate or upon a fund produced by it, after the proper costs of the Plaintiff are paid, the costs of the other incumbrancers are added to their securities, and paid in the order of their priorities.

MR. *Duncombe* had mortgaged his estates to the Earl of *Chesterfield* (a), who sold them under a power of sale. The incumbrances on the estate were very numerous, and before the purchases had been completed, the Plaintiff Mr. *Ford*, one of the *puîsné* incumbrancers on the estate, instituted this suit against the other incumbrancers and some of the purchasers, to secure the surplus fund, and praying that the priorities and amounts of the several incumbrancers upon the residue of the purchase-moneys might be ascertained and the residue distributed accordingly.

There were about seventy Defendants to the suit, and there was a small but immaterial part of the estate unsold.

By the decree, made in 1853, it was referred to Chambers to ascertain what incumbrances there were affecting the residue of the purchase-money or the hereditaments remaining unsold and their respective priorities, and what was due to them respectively.

The Chief Clerk certified the priorities of six, in which the Plaintiff was not included, and stated, "that in the prosecution of the decree, certain charges and incumbrances, which were set forth in the schedule, had been claimed," and as the above six incumbrances "considerably exceeded the fund in Court, no adjudication had, for the present, been finally made upon such charges and

(a) 16 *Beav.* 516; 19 *Beav.* 428.

and incumbrances." The consequence was that the Plaintiff had no interest.

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Mr. Follett and Mr. Southgate, for the Plaintiff, asked for his costs of suit, and this was scarcely contested, for the proceedings of the Plaintiff had secured most of the purchase-moneys, which were in some considerable risk.

Mr. R. Palmer and Mr. Amphlett, for the Earl of Chesterfield.

Mr. Lloyd, Mr. Giffard, Mr. Joyce, Mr. Cairns, Mr. Bagshawe, Mr. Humphry, Mr. Bristowe, Mr. Walford, Mr. Hobhouse, Mr. C. Hall, Mr. Selwyn, Mr. Jessell, Mr. Rowcliffe, Mr. Wickens and Mr. Drewry, for the Defendants.

It was contended, on the part of the incumbrancers subsequent to the six, that the costs of all parties must, in the first instance, be paid out of the fund, and that the remaining fund would then be divisible amongst the incumbrancers, according to their priorities.

White v. The Bishop of Peterborough (a); Kenebel v. Scrafton (b); Armstrong v. Storer (c); 3 Daniell's Pr. (d) were the authorities relied on.

The MASTER of the ROLLS.

I will, in the first place, dispose of the question of costs, which has been very much discussed on this occasion.

I and hold the settled rule and practice of this Court, one which I have acted on in a great number of cases,

(a) Jacob, 402.
(b) 13 Ves. 370.

(c) 14 Beav. 535.
(d) Pages 18, 62.

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cases, to be, that in a suit for the administration of an estate, all the proper and necessary parties are paid their costs in the first instance, and before the fund is administered. But where the suit is by a mortgagee or for the benefit of mortgagees to ascertain priorities upon an estate or upon a fund which is the produce of the estate (after payment of such costs as may be proper to the Plaintiff, in the first instance, where all persons obtain the benefit of the suit), the costs of the mortgagees are added to their mortgage securities. I have always considered that to be the decision in *White v. The Bishop of Peterborough* (a), and on reading the judgment, I find nothing in it to contradict that view of the case. It does not appear that any third incumbrancer appeared on that occasion. It undoubtedly appears, from a report of a former stage of the case, that there were subsequent incumbrancers (b); but what part they took does not appear, and all that was asked for, in that case, was the costs of the Plaintiff. *Kenebel v. Scrafton* (c) is referred to as an authority for the proposition, that the costs of all the incumbrancers are to be first paid. I am of opinion that it is no authority for that purpose.

The question came before Vice-Chancellor *Wigram* in *Hepworth v. Heslop* (d), which was a creditor's suit, the mortgagee came in under the decree, and said he would consent to a sale of the property free from incumbrances. The question was, whether the costs of the sale were to be paid prior to the principal, interest and costs of the mortgage, and Sir *James Wigram* determined they were not, but that the mortgagee, who was no party to the suit and had merely consented to the sale free from incumbrances for the benefit of the estate,

(a) *Jacob*, 402.

(b) 3 *Swanst.* 109.

(c) 13 *Ves.* 370.

(d) 3 *Hare*, 485.

estate, was entitled, out of the purchase-money, to be paid his principal and interest and costs in the first instance. The Vice-Chancellor refers to *Kenebel v. Scrafton*, and says (a) :—" If *Kenebel v. Scrafton* be an authority to the contrary, it will, as far as my experience goes, be found to have been overruled in practice, for which *Upperton v. Harrison* (b) and *Aldridge v. Westbrook* (c) are authorities. In *Tipping v. Power* (d), I had occasion to consider, but not to decide this point, and I then satisfied myself, that the mere circumstance that a mortgagee concurred in a sale would not deprive him of the ordinary rights of a mortgagee as to costs. There must be some special circumstances to produce that effect."

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I refer to that case for the purpose of shewing that it is a mistake to suppose, that the case of *Kenebel v. Scrafton* establishes such a proposition as that which Mr. Daniell (e) in his book seems to have considered. Certainly that has not been the practice, as far as I am aware, either during my own practice at the Bar or since I have had to administer justice from this seat.

With respect to my decision in *Armstrong v. Storer* (f), it was distinct from, and is perfectly reconcileable with, *Hepworth v. Heslop*. In that case, the mortgagee might, if he had pleased, have enforced his mortgage; but, instead of that, he filed a bill for the administration of the estate. The consequence, I said, was, that as he had exercised his option and adopted that course, he must be held to have done so, knowing the usual rules of the Court, and that the costs of the administration of an estate

(a) 3 Hare, 487.

(b) 7 Sim. 444.

(c) 5 Beav. 188.

(d) 1 Hare, 410.

(e) 3 Daniell's Pr. (1st ed.) 18—62.

(f) 14 Beav. 535.

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estate must be paid in the first instance and before he was entitled to be paid his mortgage debt.

I am of opinion, in this case, that the Plaintiff must be allowed his costs of the suit; and that, after that, the costs of all the mortgagees and the incumbrancers must be added to their securities; that is the manner in which this fund must be administered.

NOTE.—See *Barnes v. Racster*, 1 Y. & C. C. C. 401.

[Feb. 25, 28,
29.

Re BRIGHT'S Trusts.

Where two charges on a *chase in action* are contained in one deed, and a notice is given to the trustees which specifies one only, the trustees have not constructive notice of the contents of the deed, so that notice of both the charges is to be imputed to them.

A., having a contingent reversionary interest in a fund vested in trustees, sold

and assigned a portion of it to *B.* The assignment contained a covenant on the part of *A.* to insure his life against the contingency, and to pay the premiums, and, in default, to charge the fund therewith. *B.* gave the trustees notice of the deed so far as related to the purchase only, but not as regarded the charge for the insurance. Held, that, as to subsequent incumbrancers on the fund who had given due notice, *B.* had priority to the extent only of his purchase, and not in respect of the charge for insurance.

UNDER the will of the testator, Mr. *Bright*, on the decease of *Mary Bright*, would, if then living, become entitled to one-fourth of the residuary estate, consisting of 5,910*l.* Consols and 6,630*l.* 5*s.* Reduced.

By an indenture, dated the 14th of *March*, 1838, Mr. *Bright*, in consideration of 450*l.*, assigned to Dr. *Kennedy* so much of his one-fourth of the residuary personal estate as should, on the day of such share vesting in Mr. *Bright*, be equal to the sum of 923*l.* 3*s.* sterling. And Mr. *Bright* thereby covenanted with Dr. *Kennedy* to insure, in the name and for the use of Dr. *Kennedy*, the sum of 950*l.*, to be paid to Dr. *Kennedy* in the event of the death of him, Mr. *Bright*, in the lifetime

Lifetime of *Mary Bright*, and to pay the premiums necessary for keeping the policy on foot; and that in case *Mr. Bright* should neglect to pay such premiums regularly, it should be lawful for *Dr. Kennedy* to pay the same, and *Mr. Bright* would repay the amount, with interest, and in default, that the amount thereof should be a charge upon the one-fourth share of the residuary personal estate, and the same was thereby charged with the payment thereof accordingly.

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On the 24th *March*, 1838, *Dr. Kennedy* gave notice to the trustees of the fund of so much of the security as related to the purchase of 923*l. 3s.* sterling, but no reference was made, in such notice, to the covenant. The notice required the trustees to pay to *Dr. Kennedy*, on the decease of *Mary Bright*, if *Mr. Bright* should be then living, so much of the one-fourth part of the two sums, as should, on the day of its vesting in possession in *Mr. Bright*, be equal to the sum of 923*l. 3s.*

In *December*, 1851, *Mr. Bright* mortgaged the one-fourth of the fund to *Mr. Money* for 250*l.*, and in *May*, 1852, he further mortgaged it to *Miss Ponsford* for 250*l.*, and notices of these incumbrances were served on the trustees.

Dr. Kennedy paid 458*l.* for keeping up the policy, and he claimed this sum, in priority over the securities of *Mr. Money* and *Miss Ponsford*, by virtue of the covenant contained in his security.

Mr. Roupell and *Mr. C. C. Barber*, for *Miss Ponsford*, and—

Mr. Octavius J. Williamson, for *Mr. Money*. The charges and incumbrances rank according to the priorities of the notices to the trustees; but the notice of *Dr. Kennedy*, having been confined to one of his two charges,

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charges, his priority is limited to that one charge, and he is bound by his representations as to its extent. It is to be observed, that this is not a mortgage of the whole, but one-fourth of the fund to secure a mortgage debt, with it an auxiliary security, but it is a purchase and transfer of a particular portion of that fund, namely, the sum of 923l. 3s. The doctrine of notice is, that it reduces the fund into possession, so far as is possible in the case of a reversionary interest; it is taking possession, by converting the trustee of the assignor into a trustee for the assignee; but this is limited by the extent of the notice; for otherwise, subsequent incumbrancers would, on making inquiries, be misled by the terms of the notice. The case is the same as if this covenant had been by a separate deed, and this is not a case of constructive notice.

Mr. R. Palmer and Mr. C. Hall, for Dr. Kennedy. The rule is settled, that notice of a deed is notice of its contents. The covenant to insure is auxiliary to the security, and the case is the same as that of a mortgage, where, under a notice of the mortgage, the mortgagee would be entitled to all that is secured by it, as interest, further advances and costs. Priority is given to the first incumbrancer giving notice, in order to protect a subsequent mortgagee, but if he inquires of the trustees, and finds that the fund is affected by a deed, he is then bound to proceed to inquire as to its contents. The parties have not been misled. The charge of Dr. Kennedy is not of a portion of the stock, but a sum raised out of the whole fund. [*The MASTER of the ROLL*] If a party who has purchased one-half of a fund has given notice that he had purchased one-third, would he not be bound by that statement? That is a different case; but even a general notice that he has a mortgage on the trust fund would do. [*The MASTER of the ROLLS*. I think so.]

Th

object of notice is not to create a registry of the
ances, but to warn a purchaser of the existence
charge, and to put him upon his guard to make

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In a mortgage of houses, there is usually a
to insure and a charge on the property for the
surely a notice of the mortgage would be
as to the charge for insurance.

Loupell, in reply, referred to *Money v. Jordan* (a),
obligations of parties to make good their re-
tions.

Following cases were cited:—*Hamilton v. Royse* (b);
Le v. Mace (c); *Ex parte Hennessey* (d); *Wil-*
v. Livesey (e); *Wilde v. Gibson* (f); *Peacock*
(g); *Ware v. Lord Egmont* (h); *Foster v.*
Il (i); *Gibson v. Ingo* (k); *Jones v. Smith* (l);
Watts (m); *Dearle v. Hall* (n).

MASTER of the ROLLS. I will consider this case.

MASTER of the ROLLS.

question on this petition, which is in the nature
use, for it is a petition under the Trustee Relief
comes on upon the certificate of the Chief Clerk,
—whether the notice given by Dr. *Kennedy* to the
of his charge on a *chose in action* is sufficient
done subsequent incumbrancers who advanced
their

Beav. 372.
Ch. & Lef. 327.
Male & G. 25.
Mon. & L. 559.
Beav. 206.
H. L. Cas. 605.
Wile's Mortgages, App.

693.
(h) 4 *De G., M. & G.* 460.
(i) 3 *Cl. & Fin.* 456.
(k) 6 *Hare*, 112, 124.
(l) 1 *Phillips*, 253.
(m) 1 *Mac. & Gor.* 150.
(n) 3 *Russ.* 1.

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their money without knowledge of this covenant to keep up the insurance. Dr. *Kennedy* has advanced 458*l.*, and the question is, whether he is entitled to add that to the previous sum of 923*l.* 3*s.* and to have the whole paid out of the one-fourth of the residue to which Mr. *Bright* became entitled on the death of the tenant for life.

It is contended that notice of the deed is notice of all its contents, and that notice of a general charge by the deed would have been sufficient, and have made persons bound to see to the extent of the charge. I concur in this, but the notice of this deed, accompanied with a statement of its contents, which is erroneous, does not necessarily give a person notice of the real contents of the deed. The case of *Jones v. Smith* (a) shows this: there *Smith* being about to take a transfer of a mortgage on *Jones's* estate, and to make him a further advance, was told that a settlement had been made on his marriage, but that it related to the wife's fortune, and did not include the mortgaged property. The statement turned out to be false, for the settlement did include it; yet it was held, that *Smith*, who had acted *bonâ fide*, had not constructive notice of the contents of the settlement. Can there be any distinction where a deed affects two particular subjects, and it is stated, that it only affects one of them? Suppose a person had two distinct funds in the hands of the same trustee, and had charged the two funds by the same deed, so that a charge of 500*l.* affected one fund and 400*l.* the other. Both charges being created by one deed, would notice to the trustees that one fund was charged be notice that the other was charged also, because they were both created by the same deed? I am of opinion it would not; the fact of the two charges being united in one deed

(a) 1 *Phillips*, 244.

deed instead of in two could make no difference. If two distinct properties were charged with one mortgage by two deeds it would not differ from its being done by one deed. Assume, therefore, that in this case the covenant creates a separate and distinct charge on separate and distinct sums of money, then, I am of opinion, that, notice that 923*l.* 3*s.* of it had been sold for 950*l.*, was not notice of a separate and distinct charge, which could not affect subsequent incumbrancers without notice of it. The question then is, was this a separate and distinct charge or something tantamount to it, or was it a covenant ancillary to the enforcement of the primary charge of 923*l.* 3*s.* and introduced to make it available? because, if it was, I am of opinion, that notice of the deed is notice of all that was properly necessary for the enforcement of the charge. I think that this was a separate and distinct charge on the property. It is in fact a different species of contract, which, in its operation, includes funds not affected by the transaction mentioned in the notice. £923:3*s.* were sold by Mr. *Bright*, and therefore notice was given that the one-fourth of the share of 5,910*l.* Consols, and 6,630*l.* Three per Cents. Reduced, was diminished by 923*l.* 3*s.* Then to this was added a covenant by which the remainder, and not the 923*l.* 3*s.* sold out and out, was charged with the premiums of the policy of assurance. This affects a distinct part of the one-fourth of the residue, which the trustee and the persons applying to him had reason to believe to be unincumbered.

Suppose the case had been, that, independent of this 923*l.* 3*s.*, Mr. *Bright* had owed Dr. *Kennedy* a sum of money and had said, "I will insure my life and pay the premiums, and if I should neglect to pay them, you shall have a charge on the remainder of this trust fund," can any body doubt that this would have been a separate

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and distinct transaction affecting a separate and distinct sum of money, in respect of which a separate and distinct notice would be required? Is it altered by the circumstance that it was all done together? I am of opinion it is not.

It is obvious that this covenant is not ancillary enforcing payment of the 923*l.* 3*s.* It does, in fact, make a different species of contract, because it secures a sum to Dr. *Kennedy*, free from any contingency.

The result is, that, in my opinion, this is a mortgage, to the extent of the premiums paid on the policy, on the remainder of the share of the property not sold, by reason of its being a separate and independent covenant, not necessarily connected with the former charge; and that due notice of it not having been given, it is invalid as against subsequent incumbrancers. It is as if Dr. *Kennedy* had said, "there is nothing more due to me," for I think that the assertion, by a mortgagee, that his charge is of a particular amount, is an assertion that the charge does not go beyond that amount.

In respect of 458*l.* Dr. *Kennedy* must, therefore, be postponed to the other and subsequent incumbrancers. I shall make the order for the division of the fund according to this order of priority.

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TRUELL v. TYSSON.

WILLIAM HENRY STACPOOLE was seised in remainder in fee of the *Clanville* Lodge estate, to the life estate of *Jane Stacpoole*, the widow of *Hugh Stacpoole*. By his will, dated in 1845, *William Stacpoole* devised it to trustees in fee, upon trust certain annuities, with remainder to his wife for life remainders in strict settlement.

He declared, that it should be lawful for his executors, "with the consent in writing of the tenant for life, to sell the property in tail, for the time being entitled in possession, under the limitations thereinbefore contained, and if not, then at their own discretion, to sell the property, and for that purpose to revoke the existing uses, and give valid receipts for the purchase-money. The proceeds were to be laid out in lands to be purchased, and the same to be sold to the same uses.

The testator died in 1847.

In a special case stated, "that an advantageous offer for the purchase of the said *Clanville* Lodge estate had been made, the Defendant *Jane Stacpoole*, at the request of the Plaintiffs (the trustees), and in order to enable them to exercise the power of sale contained in the will of *William Henry Stacpoole*, consented to sell the same accordingly, prior to the contract hereinafter made, and duly surrender and merge in the freehold and tenancy of the hereditaments, the estate to which *Jane Stacpoole* was entitled therein for her life, under the will of *Hugh Stacpoole*."

March 6, 7.

A testator, being seised of an estate in remainder, subject to the life estate of *A. B.*, devised it to *C. D.* for life, with remainder in strict settlement, and empowered the trustees to sell it, with the consent of the tenant for life "entitled in possession" under his will. *A. B.* surrendered his life estate to *C. D.*, to enable the trustees, with *C. D.*'s consent, to sell: Held, that they could make a good title.

Distinction between accelerating powers to charge and powers of sale.

"Such

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"Such surrender and merger were absolute and *bonâ fide*, although, as aforesaid, made for the purpose of facilitating a sale. The said *Jane Stacpoole* is still living.

"The Plaintiffs have since the surrender and merger, with the consent in writing of the widow of the said *William Henry Stacpoole*, as the person for the time being entitled in possession under the limitations contained in the will of *William Henry Stacpoole*, contracted and agreed with the Defendant for the absolute sale to him of the *Clanville Lodge* estate, in fee simple, at the price of 9,000*l*.

"The sum of 9,000*l*. is a full and ample price for the purchase of the said hereditaments.

"An objection has been taken by the Defendant as to the validity of the proposed exercise, by the Plaintiffs, of the power of sale during the lifetime of the said *Jane Stacpoole*."

The question, on this special case, for the opinion of the Court was, whether the Plaintiffs could, with the consent of the widow of *William Henry Stacpoole*, and during the life of the widow of *Hugh Stacpoole*, exercise the power of sale and revoke the uses of the will and appoint new ones.

Mr. *Dart*, for the Plaintiffs. Under the circumstances stated in this special case, the Plaintiffs can make a good title under the power of sale. The purchaser relies on the doctrine stated in *Sugden's Powers* (a), relative to powers of charging. He says, "It

(a) Vol. 1, p. 354 (6th ed.)

frequently happens, that powers are given to parties to be exercised by them when in the actual possession of the estate. In some cases, it would be desirable that the power should be given so as to enable the party to exercise it, although his remainder has not fallen into possession, and, at the same time so as not to accelerate the charge under the power. Sometimes, when a person whose remainder has been desirous to execute his power as in possession, it has been attempted to put the party in a situation to do so, by accelerating the possession of the estate. Mr. *Butler* observes, that in one case it is not that this will answer the object intended; that is, where *A.* is tenant for life, with the immediate remainder (without any limitation to trustees) to *B.* for life with a power for *B.* to jointure when in possession. Now, if *A.* surrenders to *B.*, *B.* is to all purposes in possession of the estate, and, therefore, in a situation to exercise his powers. But he adds, that where there is an intermediate estate this never can be relied on. It is expressed in the deed, as it generally is, that it shall be lawful for the party to exercise the power when in possession under the limitations, and there is a limitation to trustees to preserve the contingent remainders, the first tenant for life can in nowise put the second tenant for life in possession of the estate but by an actual conveyance of his life estate; consequently, the party will then be in possession, not by virtue of the limitations of the deeds, but by the act of the first tenant for life. For, instead of being tenant in possession for his life only, as he would be if he was in possession under the limitations in the deed, he is tenant in possession for the life of another person, with a remainder for his own life; so that he has two estates which are perfectly distinct, and under the limitations of the settlement he is only tenant for life in remainder.

Where

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Where these words, therefore, are inserted, it seems clear, that the party is not in possession within the words or meaning of the deeds, and, consequently, not in a situation for exercising his power. Where these words are not inserted, it may be contended that they ought to implied.

"Now there seems ground to contend, that even where there is no limitation to trustees, the power cannot be duly exercised. The question is not, whether in strictness of law the tenant is, after the surrender, in possession under the limitations, which clearly is, but whether the testator intended that the power should be executed in the given event. It is, in truth, a simple fraud on the remainderman. Suppose *A.* to be tenant for life, remainder to *B.* for life, remainder to *C.*, with a power to *B.* to jointure when in possession. It seems clear, that the testator could only mean that *B.* should exercise his power on the death of *A.* or forfeiture of his estate, that is, he can be only considered to have contemplated the determination of the estate by the act of God (death) or the act of law (forfeiture). But if *A.* surrender to *B.*, who exercises his power, and then *B.* die in the lifetime of *A.*, the estate will go to the remainderman charged with the jointure; whereas, without the assistance of *A.*, the estate could not have been charged by *B.* in his (*A.*) lifetime. It may be said, that the possession of *C.* the remainderman is accelerated, inasmuch as if no surrender had been made he would not have been entitled to the possession till the death of *A.*; but this argument leaves the testator's intention behind, and makes it a mere question of loss and gain. And if we look at the question in that light we shall find that surrenders of this kind are made for the express purpose of charging the

he remainderman's estate, so that he is never benefited by the arrangement. A lease is granted previously to be surrendered in order to secure the profits to the tenant for life who surrenders. To hold, therefore, this to be within the words of the will or settlement, is to authorize the tenant for life in possession and the next remainderman to commit a fraud on the other remainderman."

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In this passage, Sir *E. Sugden* is discussing the acceleration of powers of a very different nature from the present, namely, powers of charging and jointuring, and where, by the acceleration of the second estate for life, the remainderman may be saddled with double the amount of the charges intended. The reasoning is inapplicable to a power of sale or exchange, where the value of the interest of the remainderman remains the same, or is probably increased by a judicious sale.

The circumstance, that a settled estate is reversionary, does not prevent its being sold under a power of sale contained in the settlement, though the rights of the tenant for life are thereby accelerated to the prejudice of the remainderman. Thus in *Clark v. Seymour* (a), a reversion in fee expectant on a life estate was settled in strict settlement, and the trustees were empowered, at any time thereafter, with the consent of the tenant for life under the settlement, to sell or exchange the lands. The two successive tenants for life and the trustees sold the estate, and it was objected that the power of sale could not be exercised until the reversion came into possession; but the Court held, that the power was well exercised. So in *Giles v. Homes* (b) a reversion of a moiety

of

(a) 7 *Simons*, 67.(b) 15 *Simons*, 359.

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 v.
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of a farm was settled on a marriage, and the trustees were empowered to sell when in possession, and the husband and wife covenanted that if they should thereafter acquire any other share in the farm, they would convey it upon the trusts and subject to the powers of the settled moiety: after that moiety had fallen into possession, a moiety of the other moiety descended to the wife, not in possession, but subject to the life interest; it was held, nevertheless, that it, as well as the settled moiety, was saleable under the power.

• Mr. *Bowring, contrâ.* The Plaintiffs are strictly bound by the terms of the power, by which they are only enabled to sell, with the consent of the tenant for life when in possession under the will. Here the tenant for life is in possession not under the will, but under a private arrangement with a tenant for life paramount to the will, and which was effected for the express purpose of enabling the Plaintiffs to accomplish, indirectly, that which the power forbids them to do directly. The trustees with the assent of the first and second tenants for life could not exercise the power of sale, neither can they make a good title by obtaining a surrender, for the widow of *William Henry* is not in possession under the will, but under the surrender, and this is not the possession contemplated by the testator. The testator, on the face of his

NOTE.—In *Blackwood v. Borrowes* (4 Dru & War. 468) Sir E. Sugden says, "It is settled by the authorities, that unless there be a restriction against an immediate sale, the power may be exercised at once, as to increase, or rather advance, the interest of the tenant for life at the expense of the remainderman; for if, instead of waiting for the expiration of the particular estate, the reversionary interest be sold, it must of course be sold at a much less price than the estate in possession would have produced. The authorities have, however, settled the question, and wisely I think established, that if there be no intention expressed, the power may be exercised immediately."

his will, states the estate for life of the widow of *Hugh*, and had that fact in his contemplation when he speaks of "being entitled in possession, under the limitations hereinbefore contained." The reasoning of Sir *E. Sugden* is applicable, for the rights of the remainderman may be prejudiced and certainly are altered by an act not within the scope of the power. He may prefer having the family estate and be desirous that it should not be aliened or converted into money, and even if the full value be obtained, he may attach to the property, from personal feelings, a *pretium affectionis*.

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In *Coxe v. Day* (a), where an estate was settled to a father for life, with an immediate remainder to his son for life, with remainder over, with a power to the father during his life, and *after his decease* to the son, during his life, to lease. The father conveyed his life estate to the son, who, during his father's lifetime, exercised the power of leasing, but the Court of King's Bench held the lease to be void.

The MASTER of the ROLLS.

I will mention this to-morrow, after consulting the authorities.

The MASTER of the ROLLS.

March 7.

The question in this case is, whether the power of sale given by the will of the testator can be properly executed in the lifetime of *Jane Stacpoole*, the widow of

Hugh

(a) 13 *East*, 118.

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 v.
 TYSSON.

Hugh Stacpoole. She has surrendered her life estate, by means of which, the subsequent estates are accelerated, and the widow of the testator, as the first tenant for life under the will, is now in actual possession of the estate. The trustees propose selling on advantageous terms and *Jane*, the widow of *William Henry* and the first tenant for life, has given her consent to the sale, and under these circumstances the doubt arises.

It seems to be, if not settled, at all events the better opinion, and one which the Court would be disposed to act on, that when a power to charge an estate is given, under circumstances like these, that is when there are two successive life estates and an estate in remainder, and a power is given to the tenants for life in possession to charge, that power cannot be exercised by the second tenant for life, upon the first surrendering his life estate so as to bring the second into possession. The reason is obvious, it might be done for the purpose of fraud and for multiplying the charges on the estate against the remainderman: the testator has given the property in such a way, that the estate of the person in remainder shall not be charged by the second tenant for life, until he comes into possession of the estate after the death of the first tenant for life. If it were otherwise, the result might be this:—the first tenant for life might surrender his estate and so enable the second to create the charge and he might afterwards die before the first tenant for life, and a charge might thus be created which was never contemplated, and which could never have taken effect under the strict words of the settlement; great frauds might thus be committed.

But I am of opinion, that this reasoning does not apply to a power of sale, and that the distinction has been

been correctly taken in the argument. A charge diminishes the estate of the remainderman, but a sale and exchange does not, and the reasoning as applicable to accelerating a power to charge, fails in regard to a sale or exchange. In the case of a charge, it is the intention of the testator that the interest of the remainderman shall not be diminished, except in the particular case specified, but in the other case, there is no diminution of his interest, but only a change in the property; the same presumption, therefore, does not arise. The conclusion I have come to is this, that this rule does not apply to powers of sale and exchange. It is admitted to be a question of intention, and you must therefore look to the words of the will. The power of sale is attached to the estate for life, which is accelerated; but it is obvious, that, as regards the tenant in remainder, the value of the subject matter given to him by the donor is not in the slightest degree diminished by the exercise of the power of sale. The land from realty is turned into money, but the value, by a *bonâ fide* sale, is exactly the same. In the case of a charge it is not so, the interest of the remainderman is diminished by an additional charge, by something taken away, under circumstances not contemplated by the donor, and therefore it does not come within the terms of the power.

Another argument suggested, is the possibility that the remainderman might wish to preserve the family estate unsold, that he may attach to it a *premium affectionis*. I am of opinion that this argument cannot apply in the present case, because the power of sale shews, that the donor did not intend or wish the estate to be preserved; the remainderman must take it subject to the condition attached to the gift, and has no right to prevent its

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its being sold, if the tenant for life wishes it, provided the sale is *bonâ fide*.

It is not to be presumed, that the intention of the testator is other than that which he has expressed in plain terms on his will, and I cannot hold, that the tenant for life shall not be able, during the existence of the life estate, to *exercise* the power *bonâ fide*.

I am of opinion, that the question ought to be answered in the affirmative.

1856.

WINTOUR v. CLIFTON.

March 12, 13,
14 and 15.

April 9.

THIS suit was instituted to determine certain questions which arose on the construction of the will of Sir *Robert Clifton*. The Plaintiffs were the trustees of the personal estate of Sir *Robert Clifton* under his will, and were also trustees to preserve contingent remainders, under the uses to which his real estate stood limited under the trusts of his will.

The testator devised to *A.* and *B.* successively for life, and to the first and other sons of *B.* in tail, not only his own fee-simple estates, but others of which he was tenant in fee in remainder (subject to intermediate estates to *A.* and *B.*) in fee. It was held, upon the construction of the terms of the will, that the testator intended to dispose of more than his

Mr.

The first question which arose and which had to be determined was, whether the will of Sir *Robert Clifton* raised a case of election against the present baronet, Sir *Robert Juckes Clifton*, and the second question (which arose, in the event only of the Court being of opinion that a case of election existed) was, whether Sir *Robert Juckes Clifton* had already bound himself by making such election.

own interest in the settled estates, and that therefore *A.* and *B.* were bound either to give effect to the will, or to make compensation.

In order to constitute a concluded election, the act done must be with a full knowledge of the circumstances of the case and the rights to which the person put to his election was entitled.

Clifton Hall, and the manor and estate of *Wilford*, stood limited to the testator for life, with remainder to *A.* for life, with remainder to *B.* in tail, with remainder to the testator in fee. The testator was also seised in fee of newly purchased lands at *Wilford* and of other hereditaments. He devised "his manor" of *Wilford* and "his mansion-house" called *Clifton* Hall, and his fee-simple property, to *A.* for life, with remainder to *B.* for life, with remainder to *B.*'s first and other sons in tail, &c. &c. The will empowered the tenants for life, when in possession, to lease (except the mansion, &c.), to jointure, and to charge portions for younger children. The testator also gave pictures, &c. as heir-looms, and his personal estate was to be invested on like trusts. The testator died in 1837, and in 1848 *A.* and *B.* suffered a recovery. Held, that, by his will, the testator was disposing not only of his reversion, but of the fee-simple in the settled estates, and that therefore *A.* and *B.* were bound to elect: and, secondly, that they had not elected by joining in the recovery.

A. (in the above case) had died in 1852. Held, that his executors had improperly made parties to a bill subsequently filed to determine the question of election.

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Mr. Lloyd and Mr. C. Browne, for the Plaintiff.

Mr. Rolt and Mr. Selwyn, for Sir Robert Juck
Clifton.Mr. Lee, Mr. R. Palmer, Mr. Follett, Mr. Bagshaw
Mr. Greene, Mr. Southgate, Mr. J. H. Palmer, N
Kenyon, Mr. Druce, Mr. Osborne, Mr. Jones Batem
and Mr. Bathurst, for other Defendants.

The following authorities were cited:—*Welby v.*
Welby (a); *Church v. Mundy* (b); *Ford v. Ford* (c);
Rancliffe v. Parkyns (d); *Read v. Crop* (e); *Doe v.*
Martyn (f); *Hicks v. Sallitt* (g); *Blake v. Bun-*
bury (h); *Dillon v. Parker* (i); *Gretton v. Haward* (k);
Chester v. Chester (l); *The Attorney-General v. Vigor* (m);
Bootle v. Blundell (n); *Doe v. Roake* (o); *Evans v.*
Evans (p); *Napier v. Napier* (q); *Padbury v. Clark* (r);
1 *Jarm. on Wills*, 556 (2nd ed.); *Sugd. Real Pr.*, tit.
“Electio.”

April 9.

The MASTER of the ROLLS.

I think it unnecessary to go through the history of
the title to the property prior to Sir Robert Clifton's
possession of it. It will be sufficient to make my view
clear, if I state what were the estates and interests
which Sir Robert Clifton had in the various properties
he

- (a) 2 *Ves. & B.* 187.
(b) 12 *Ves.* 426; 15 *Ves.* 396.
(c) 6 *Hare*, 486.
(d) 6 *Dow.* 149.
(e) 1 *Bro. C. C.* 491.
(f) 8 *Barn. & Cr.* 497.
(g) 3 *De G., M. & G.* 782.
(h) 1 *Ves. jun.* 514.
(i) 1 *Swans.* 359.

- (k) 1 *Sim.* 425, n.
(l) 3 *P. Wms.* 56.
(m) 8 *Ves.* 256.
(n) 1 *Mer.* 219.
(o) 2 *Bing.* 497.
(p) *V. C. K.* 23 July, 1855.
(q) 1 *Sim.* 28.
(r) 1 *Hall & Tw.* 341 and 2
Mac. & G. 298.

He possessed, and the manner in which he has dealt with them by his will.

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The property of which Sir *Robert Clifton* was possessed may be thus divided :—

First, the mansion house at *Clifton*, together with the garden grounds and woodlands, held in immediate connexion with the mansion, and which have been called “the mansion and domain lands.” These, under the will of his father, Sir *Gervas*, so far as it is material to state the limitations, stood limited to Sir *Robert* for life, with remainder to Sir *Jukes* for life, with remainder to the present baronet, Sir *Robert Jukes Clifton* in tail male, with an ultimate remainder in fee to the testator Sir *Robert*.

Secondly, the manor and old estate of *Wilford*, which was, under the will of Sir *Gervas*, limited, in like manner, to Sir *Robert* for life, remainder to Sir *Jukes* for life, remainder to Sir *Robert Jukes Clifton*, the present baronet, in tail, with an ultimate remainder in fee to the testator Sir *Robert*.

Thirdly, the manor and estate of *Clifton-cum-Glapton*, of which, under the settlement made on the marriage of Sir *Gervas* and a recovery subsequently suffered by Sir *Robert*, he was tenant in fee simple.

Fourthly, the new estate of *Wilford*, that is, certain additional lands purchased at *Wilford* by Sir *Robert*, of which he was tenant in fee simple.

Fifthly, the two advowsons of *Clifton-cum-Glapton*, and of *Wilford*, of which he was seised in fee simple.

G G 2

Sixthly,

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Sixthly, besides these, Sir *Robert* was owner, in fee simple, of the manor and estate at *Barton* and *Chilwell*. I omit all statement of the limitations, which either did not take effect, or have expired, and this was, in the events which happened, the manner in which these properties stood limited.

This being so, it is obvious that the matters which Sir *Robert* could dispose of by will were :—

1st. The manor and estates of *Clifton*.

2nd. The new lands at *Wilford*.

3rd. The two advowsons.

4th. The reversion in fee in the manor and domain lands at *Clifton*, and in the manor and old *Wilford* estates.

5th. And besides these, he had power to dispose of the *Barton* estate.

Having this power, Sir *Robert* made his will on the 7th *December*, 1832. By it, he devised in the words following :—“ I give and devise all those my manors or lordships, or reputed manors or lordships, of *Clifton* cum-*Glaption* and *Wilford*, otherwise *Wilsford*, in the said county of *Notts*, and the advowson of the churches of *Clifton* and *Wilford*, in the same county, and also all that my capital messuage or mansion-house called *Clifton* Hall, and all and every my messuages, farms, lands and hereditaments in the said county of *Nottingham*, and usually called the *Clifton* estate, with their rights, members and appurtenances, to the uses hereinafter declared, that is to say :”—then he proceeds to devise them to Sir *Jukes Clifton* for life, without impeachment of waste, and after his decease to Sir *Robert Jukes Clifton* for life, without impeachment of waste, remainder

mainder to the first and other sons of Sir *Robert Jukes Clifton* in tail male, remainder to the second and other sons of Sir *Jukes Clifton* in tail male, with divers remainders over, under which, the Defendant *Henry Robert Markham* is the first tenant in tail now *in esse*. He then devised the *Barton* estate to his brother, Sir *Arthur Clifton*, for life, with remainder to his first and other sons in tail male, remainder to Sir *Jukes Clifton* for life, with like remainders over for life and in tail, as thereafter expressed with reference to his *Clifton* and *Wilford* estates, with a difference not necessary to be specially mentioned. The proper and ordinary limitation to trustees to preserve the various contingent remainders above mentioned was made to Messrs. *Morse* and *Westcomb*, and their heirs, for this purpose. He then directs, that the persons in possession of the estates, under these limitations, shall take the name and arms of *Clifton*, with a proviso of forfeiture, in case of neglect in so doing for twelve months.

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The will then contains a power to the tenant for life in possession of the hereditaments devised, from time to time to grant leases of any part thereof, (except the house and domain lands,) for twenty-one years, reserving the best rent without fine or premium. The will then contains a proviso, authorizing the various tenants for life under the will, when in possession of the rents, to grant a rent-charge or rent-charges in favour of any wife, not exceeding in the whole 800*l.* per annum, to be charged upon all or any part of the hereditaments thereinbefore devised, except the mansion-house at *Clifton Hall*, and the domain lands and fisheries and the advowsons.

The will then contains a power to the tenant for life,
 in

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in like manner, to charge the hereditaments devised (except the property last excepted) with portions for younger children, but so that the amount for one such child should not exceed 10,000*l.*, and for two or more such children should not exceed 20,000*l.* in the whole.

The testator then bequeathed the plate, linen, china, books, pictures, furniture and wines, in or about *Clifton Hall*, to the trustees, *Morse* and *Westcomb*, their executors, administrators and assigns, upon trust to permit them to be used by the persons entitled, from time to time, under the limitations thereinbefore contained, the mansion-house, and the same were (so far as they were not in their nature consumable by use), to be in the nature of heir-looms; and the testator directed the person, so entitled to such use, to sign an inventory of such articles, and an undertaking to restore them in the same condition, with proper allowances for reasonable wear and tear. Then, after giving various legacies, the testator gave all the residue of his personal estate and effects to the same trustees, in trust to convert and invest in the purchase of lands in *England*, to be settled in the same manner as the hereditaments devised by his will, so far as they might be capable of taking effect, and in the meantime, to be invested in the funds, and the interest thereof to be paid to the person entitled in possession to the devised estates. The testator appointed Sir *Jukes Clifton*, Sir *Arthur Clifton*, and *Morse* and *Westcomb* executors of his will, and also gave a power of appointing new trustees.

On the 28th of *April*, 1837, Sir *Robert* died, and the will was proved by the four executors. The present Plaintiffs have since been duly appointed trustees of the will, in the respective places of *Morse* and *Westcomb*, who have both since died.

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The question on this will is, did Sir *Robert Clifton*, according to the true and proper construction of it, devise and deal with the present interest in the mansion-house at *Clifton Hall* and the domain lands attached to it, and also in the manor and old estate of *Wilford*, over which he had no power of disposition by will, or were the devises in questions confined to the disposal of the ultimate reversion in fee, which he had the power to devise. If the former, a question of election arose, not so if the latter is the true construction to be put on this will.

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For the persons who contend that a question of election arose, the expressions in the will are strongly insisted upon, which points to the enjoyment, under the limitations contained in his will, of the mansion-house at *Clifton Hall*, the domain lands, the manor and estates of *Wilford*.

On the other hand, Sir *Robert Jukes Clifton* contends, that the words of the will are satisfied, by having regard to the fact, that the reversion in fee in the house and domain was vested in the testator, and that he meant to dispose of that reversion alone; and, also, that the new lands in *Wilford*, of which he was owner in fee, were meant to pass under the devise of the lands in *Wilford*. It is urged, that upon the will, there is to be observed an intention to confirm the settlement already made by Sir *Gervas*, to keep matters as they were, and that there is sufficient for the will to operate upon; that if that be so, it is impossible to include in his devise what the testator had no power to dispose of or to assume, that such was his intention. The words of Lord *Eldon* applicable to such cases are these: —“*Primâ facie*, it is not to be supposed, that a testator disposes of that which is not his own. It must be by demonstration

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demonstration plain, by necessary implication (meaning by that the utter improbability that he could have meant otherwise), that the case of election is raised. But where there is that plain demonstration, that necessary implication, then you must give up all, to pass according to the will, or make compensation. But it rests upon those contending for a case of election to show that there is that manifest plain demonstration and utter improbability" (a).

I now, therefore, proceed to examine the will of Sir *Robert Clifton* upon these principles, but before doing so, I think it proper to observe, that I do not understand Lord *Eldon*, by these observations, to mean, that the rules for the construction of wills are to be varied in this case, any more than as I have had occasion formerly to observe in the case of the disheirison of the heir, who is not to be disinherited unless by plain words or necessary implication. In all these cases, the meaning of the testator is to be collected from the plain import of the words he uses, and the question here is, does the testator, by these words describing the premises intend to devise a present interest in them to the objects of his bounty? With this view I have carefully read and considered the will of Sir *Robert Clifton*—in the first place by itself, with a view to arrive at what was the real intention and meaning of the testator without having regard to any technical rules of law, or to any particular decisions which may govern this case, and I have then reconsidered the will, in conjunction with the cases to which I have been referred, and which are applicable to this question.

Looking at the will by itself, I have come to the conclusion, that he meant to dispose of the present interest in the whole property of which he was possessed, as if he

(a) 6 *Dow.* 179.

he were the absolute owner of the entirety. The words I have read include the mansion-house of *Clifton* hall. If the testator had been seised in fee of that messuage, and of the domain around it, no question could have been raised to exclude it from the operation of the devise, and so, in like manner, of the *Wilford* estate. It is very true, that the will is to be read with the knowledge present to the mind, that the testator had but an interest in reversion in that property, and that he had not the whole, and it is to be assumed, that the testator did not intend to devise what he had no power of disposing of, and that the burthen of proof lies on those who contend, that a case of election arises, to show why his words are extended to the particular thing over which he had no power of disposition. I first consider the case of the house and the domain around it, of which he had only the reversion in fee, after the failure of the limitations contained in the will of Sir *Gervas Clifton*. He expressly mentions the mansion-house, and classes it with the hereditaments forming part of what is usually called the *Clifton* estate. Certainly, in ordinary parlance, the estate would be held to include the mansion-house upon it, and the garden, pleasure-grounds and groves, never let but always occupied with the house. Did he intend them both to go in the same manner? He assuredly gives the present interest in the manor and *Clifton* estate; he makes no distinction between them as to the limitations, and as to the powers of the tenants for life over them; he considers it necessary to exempt the house, grounds and plantation occupied therewith, apparently on the assumption, that, but for such exception, the power of leasing, the power of jointuring, and the power of raising portions for younger children, would extend to such house and lands. I feel it difficult to reconcile these directions and exceptions with any intention in the testator, that his

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his will was only to operate on his reversion in fee in these lands. The limitations contained in his will, which are applicable to both, are inconsistent with any such intention. His reversion in fee could not arise, until after the decease without issue of Sir *Jukes* and of Sir *Robert Jukes Clifton*, and yet to them he gave estates for life, which could have no meaning if applied only to the reversion, which was to take effect after their respective deceases without leaving issue.

If it be asked, on what rational hypothesis can it be supposed, that Sir *Robert* intended to devise property over which he had no power of disposition, for the purpose of giving to his brother Sir *Jukes*, in that property, the life estate which he already possessed by a paramount title. The answer appears to me to be this, that he intended to settle everything, and to make the whole property, both settled and unsettled, go in one direction, and according to the limitations contained in his will, and that, in consequence, he made no distinctions with respect to one part of the property and the other. There are, no doubt, difficulties to be surmounted in any view of the case, and I concur in the argument, that it is not possible to conceive, that the state of the property and interest in it was not present to the testator's mind when he made his will nor is it easy to explain, why, if he intended to affect the settled property, he did not make his devise over the lands he held in fee simple conditional on the persons taking interest therein under his will, doing such acts as should be necessary to confirm it in other respects. It is possible, that the will was framed by a professional gentleman, who, by some mistake, was not fully instructed as to the mode by which the various parts of it were held. I cannot, however, I admit, speculate on that, and these observations all tend towards

towards the construction contended for by the present baronet. But that he intended, to some extent at least, to deal with the present interest in property over which he had no power of disposition, appears to me to be certain, from the fact, that so far as the heir-looms were concerned, the testator uses words, as to them, which deals with the present interest in them, and gives them, so far as Sir *Jukes* is concerned, to the uses to which they already stood limited by the will of Sir *Gervas Clifton*. My belief is, that he did not intend to supersede or alter Sir *Gervas's* will, so far as, by that will, the property was made inalienable by the possessor; but that, following out the intention of Sir *Gervas Clifton*, who had tied up the power of disposition over the property, so far as he could by law, Sir *Robert* endeavoured to add to those restrictions the further restriction which the birth of a son to Sir *Jukes* enabled Sir *Robert* to do, but which was beyond the limits allowed by law when Sir *Gervas* died.

The same observations apply to the *Wilford* estate. It is true that the testator had additional lands in *Wilford*, on which the devise might operate; but the will cannot be confined to those lands, for he uses the words "manor" as well as "estate of *Wilford*," and the word "manor" is, manifestly, inapplicable to the newly-purchased lands, and the reasons which I have already stated, as applicable to the *Clifton* estate, are, in my opinion, conclusive to shew, that the limitations contained in the testator's will could not be confined to the new lands added on to the *Wilford* estate any more than they could to the mere reversion in fee, which he possessed after the failure of all the limitations contained in the will of Sir *Gervas Clifton*.

I think that the plain construction of the will is, that
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the testator deals with and disposes of the present interest in both the *Clifton* Hall and the domains attached to it, and in the whole of the *Wilford* manor and estate, both old and new. I concur in the observation, that his object was to bring all he could into the family estate, and to tie it up in strict settlement; but I do not concur in thinking that he simply gave or intended to give, for this purpose, all that was his, without accurately ascertaining how much was or was not settled. I think that he did not so distinguish the various parts, because he intended the whole of the family property to be so tied up in strict settlement, and that he wished to put it all into settlement, whether he had a power to do so or not. In fact, in one sense, he had that power; he might have made the acceptance of the bounties given by his will, conditional on such a re-settlement being made of the estate settled by the will of Sir *Gervas Clifton* as would have caused those estates to be settled to the same uses as the property over which he had the absolute power of disposition by will. The only question is, whether he has not done this impliedly, instead of doing it in direct terms. The whole scope of the will seems to point to the whole property being settled to one uniform set of limitations, viz., those expressed in his will.

If this be the only fair and true construction of the will, it seems to settle the question, because, in that case, the plain demonstration and necessary implication arise from the words used by the testator, that he intended to devise a present interest in the lands settled by the will of Sir *Gervas*, and that he intended thereby to cut down the estate tail of his nephew, Sir *Robert Jukes Clifton*, in those estates to an estate for life; and, if that be shown, then a case of election would arise and no person could take the benefit given by the will, without

without giving effect to it in other respects or making compensation.

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The cases cited, however, are very important, as a guide to the proper conclusion to which the Court ought to come on the construction of the will itself; and I proceed, therefore, to consider these cases for the purpose of seeing whether they affect or alter the conclusion to which the perusal and examination of the will, by itself, has led me. There are several cases which bear on this subject, but there are only two to which I think it necessary to refer, and they are those which have been most commented upon in the argument, and are both very necessary to be considered before coming to a final decision in this matter. One is the case of *Rancliffe v. Parkyns* (a), decided by Lord Eldon, and the other is the case of *Welby v. Welby* (b), decided by Sir William Grant.

The case of *Rancliffe v. Parkyns* (a), was of this nature: the testator, being seised of the manor and lands of *Ruddington*, on his second marriage settled the lands on himself for life, remainder to his first and other sons in tail male, with an ultimate remainder to himself in fee. No mention was made of the manor in the settlement. And by the settlement a provision was made for younger children. The testator had two sons, and he made a will, by which he created a term for ninety-nine years, and, subject thereto, he devised all his manors, lands and hereditaments, in various places named, including *Ruddington*, to his eldest son *Thomas* for life, remainder to his first and other sons in tail male, remainder to his second son *George* for life, with remainder to his first and other sons in tail male, remainder to the testator's daughter *Anna* in tail male, with remainder

(a) 6 Dow. 149.

(b) 2 Ves. & B 187.

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mainder to his own right heirs. The testator devised rent-charge, as a provision for his second son *George*, and he gave directions as to the payment by his tenants of money in lieu of carrying boon coals, and other directions, from which it might be implied that he meant to devise a present interest in the *Ruddington* estate. On this Lord *Eldon* observes, "If the testator had stopped here, this case would have been similar to *Blake v. Bunbury*" (a), where it was held that a case of election arose: and I may also observe, that if the case had stopped there and Lord *Eldon* had determined that a case of election arose, it would have been impossible to have distinguished that case from the present, and to have held that it governed the will of Sir *Robert Clifton*. But Lord *Eldon* goes on thus, "But it does not stop there, for he shews that he had in view the settlement of 1727, and declares that this provision was in addition to any portion given to *George* by that settlement which he expressly ratifies and confirms with everything therein contained. Now, in order to raise a case of election, you must either strike out those words or you must say that these words have the same meaning as those in *Blake v. Bunbury*, i. e. that he confirms the settlement only as far as respects the portion given by it to *George*. *George* also had an estate tail by the settlement, and he must be supposed to intend to continue that and to destroy the estate tail of *Thomas*, or to confirm the settlement, except in so far as respects the estates to *Thomas* and *George*, but he has said that he confirms it and everything therein contained; and upon what principle you are to strike out these words of such mighty import, and without any express declaration to warrant it, is more than I am able to state."

In the will of Sir *Thomas Parkyns*, also, was contained

(a) 1 *Ves. jun.* 514.

and a power to lease for twenty-one years. The way in which Lord *Eldon* deals with that power is as follows:—“(a):—“Then there is a power to *Thomas Parkyns*, to demise for twenty-one years at the rents mentioned, together with certain boons and services to which the tenants were to be bound: and it has been that, connecting this with the boon coals afterwards mentioned, Sir *Thomas* devised an immediate lease in the lands and premises at *Ruddington*. My opinion, however, is that, when a testator expressly conveys a settlement, and every thing therein contained, cannot, as against that express declaration of intention, take it by conjecture, call it demonstration, or necessary implication, or what you will, but only conjecture, that he does not mean to confirm; that you cannot reasonably conclude that, because it uses expressions which apply to some and not to others of the subjects devised, he contradicts himself; that he does not mean to confirm, although he says that he does confirm, and all upon the ground of these nice, critical observations.”

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Lord *Eldon* goes through the other clauses of the will and constantly reverts to this passage, confirmation of the settlement, as overriding the whole, and leading to the conclusion to be drawn from the express declaration. His observations are very material (b). “This is the whole of the will, and the question here is, have we that demonstration plain or necessary implication, leading at the whole of this will as I have stated it, that the testator meant to dispose of the estates tail of his sons under the settlement, and to convert them into estates for life, with remainders to their first and other sons in fee? Have you that manifest declaration plain? With respect to that, I say that it is difficult, in any case, to apply

(a) 6 *Dow.* 181.

(b) 6 *Dow.* 185.

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apply the doctrine of election, where the testator has some present interest in the estate disposed of, though it may not be entirely his own. In this case he had a present interest; he has a manor in which, for anything that appears, he had the entire fee; he has the reversion in fee of the whole estate, and he has expressly confirmed the settlement of 1727 in all its parts; so that it was impossible, in this case, to contend that he forgot the settlement, which, with everything therein contained, he expressly ratifies." By the words, "difficult in any case to apply the doctrine of election where the testator has some present interest in the estate disposed of," I understand Lord *Eldon* only to mean, that, where it is possible, the words of the testator shall be applied to that present interest, but that he does not mean to say, that in no case, in such circumstances, can a case of election arise.

The concluding observations of Lord *Eldon* on this point confirms this view, and shew that he decided the case on the particular expressions confirming the settlement to which he refers so repeatedly in his judgment (a). He observes, "But I ask whether, looking at the whole of this will, taken together, it can be just said, that the testator meant to pass an immediate interest, having the reversion only? This is a case, in which the testator expressly declares that he means to confirm the settlement and everything contained in it, and not one in which he says, that he confirms it in one particular, leaving it open to the inference that he means to destroy it in all other respects. That is not all. It is the case of a testator making a provision for his younger children, in addition to that which they had under the settlement, and at the same time confirming the settlement, not as to them only, but as to everything

(a) 6 *Dow.* 189.

thing therein contained; and not only that, but of a testator who had a manor which would satisfy the words of the devise. I do not deny,—no man can reasonably deny,—that if the testator had been asked, when he made his will and it had been read over to him, whether he meant to devise the reversion only or the possession also, he could not but admit, that with respect to these boon coals and some other minor particulars, there was an ambiguity. But what can you do, in a case where he himself has expressly declared, that he did not mean to dispose of that which was not his own, and confirms the settlement and everything therein contained." In the case of the present will, there are no such expressions confirmatory of the settlement made by Sir Gervas Clifton's will, nor is there, in my opinion, anything appearing in Sir Robert's will, by which an intention to confirm it *simpliciter* can be discovered. I am bound, therefore, to come to the conclusion, that, in this particular respect, the case of *Rancliffe v. Parkyns* is distinguishable from the present, that it cannot govern the decision I ought to pronounce.

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The case of *Blake v. Bunbury* (a), to which Lord Eldon refers, certainly without disapprobation, was also a case where the words of the testator might have been satisfied without raising the case of election. By settlement on the marriage of the testator, a rent-charge of 2,000*l.* per annum was raised, by a term out of a particular real estate of which he was seised in fee simple, in trust for himself for life, remainder to his first and other sons in tail male. The testator devised that estate to his eldest son for life, remainder to his first and other sons in tail male, with remainder to his second son

(a) 1 *Ves. jun.* 514.

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son for life, and so on in strict settlement, and he charged various legacies on the land; and by his will he stated, that he confirmed the settlement, so far as it related to his younger children. It was held, that the eldest son, if he took under the will, must convey the rent-charge to the uses of the will, on the ground that the testator had expressed the extent to which he intended to confirm the settlement, and it was therefore to be inferred, that, as to the rest, he did not do so, but endeavoured to annul it by his will.

The case of *Welby v. Welby (a)*, to which I was next referred, was one of this nature:—the testator was possessed of three estates; of one he was tenant in fee simple, of another he was tenant in tail, and of the third he was tenant for life, with remainder to his first and other sons in tail male, with reversion to himself in fee. He then devised the estates of which he was seised in fee simple to his son and heir in tail to hold to him in fee; and he devised the estates of which he was tenant in tail male, and of which he was tenant for life, to his grandson for life, with remainders over in strict settlement. Sir *William Grant* held, that this raised a case of election, and that if the son and heir in tail insisted on taking the settled estates, he must give up the estates devised to him, or make compensation out of them to the grandson. The important point arose with respect to the *Sapperton* estate, of which the testator was tenant for life, with a reversion in fee, on which his will might operate, and the will expressly uses the word “reversions” as part of the subject which he disposed of by his will. The observations of Sir *William Grant* are strictly applicable to the present case he held, that the limitations there being unfitted

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(a) 2 Ves. & B. 187.

apply to the reversion, it must be held that the testator intended to demise a present interest in those lands. His words are (a):—"The question is, what the testator intended to include? The Plaintiff contends, that on the face of this will it is clear, that it was the body of the estate, the land composing the estate, and not a mere reversionary interest in it, that was meant to be devised. All the words of description are applicable to the land itself, rather than to an interest in the land. *Sapperton* is included in the same description with *Pointon*. As to *Pointon*, he could not be contemplating a reversionary interest, for he had none in it. It was the whole estate he meant to pass. Both estates he speaks of as being his, and both as being alike devised to him by his brother's will. Both estates had been enjoyed by his brother *John*, as tenant in tail: he was merely tenant in tail of *Pointon*. In *Sapperton* he had also the reversion in fee. He gave, by general words, all his real and personal estate whatsoever to his brother *William*; but *William*, being the heir at law, would take the reversion by descent and not by the will; so that, in truth, he took nothing either in *Pointon* or *Sapperton* under *John's* will. *William*, however, probably forgetting how the estates had been settled, at a remote period, seems to have supposed that he took, by *John's* will, the estates of which *John* had been in possession. All the words of *William's* will import that he conceived himself to have the same interest in *Sapperton* and *Pointon*, and that it was an absolute interest which he had in both. The limitations which he makes of these estates are likewise the same, and they are limitations adapted to estates in possession, and not to estates in reversion." He also uses the following expressions: (b)—"Here the reversion which the testator had

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(a) 2 V. & B. 192.

(b) 2 V. & B. 194.

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had in *Sapperton* could not fall in, nor the devise of it consequently take effect, until there should be a failure of all issue male of his own body; and yet he limits the *Sapperton* estate, with others, to his sons for life, without impeachment of waste; with remainder to his grandson for life, without impeachment of waste, remainder to his first and other sons in tail male. That is, he gives estates for life and in tail to persons who must be dead before the reversionary interest could be enjoyed, which is a very reversionary interest, depending on their deaths, as what the Defendant says the testator meant to give them for their lives. He also gives to his son and grandson powers of leasing and of jointuring, powers which can apply to nothing but estates of which they might be in the actual possession. It is impossible that the testator could mean to make so absurd a disposition as this would be, if confined to the reversion.

It is impossible, as it appears to me, to hold that no case of election arose in the present case, without overruling *Welby v. Welby*. In truth, the implication to be drawn from the contents of the will of Sir Robert Clifton is, in my opinion, stronger than that in *Welby v. Welby*.

It is suggested, that *Welby v. Welby* and *Rancliffe v. Parkyns* cannot stand together, and that, in truth, the decision in *Welby v. Welby* was founded upon Sir William Grant's opinion, expressed in *Church v. Mundy* (a), where he held, that a reversion did not pass under general words, on account of the inaptitude of the limitations,—an opinion, it is said, clearly erroneous, and overruled by Lord Eldon on appeal; and the questions, it is contended, are, *è converso*, substantially the same, being, in one case, whether the devise is to be extended to

(a) 12 Ves. 426.

to the reversion, and in the other, whether it is to be confined to the reversion. But there are material distinctions between these cases, which, in either event, must depend on the intention of the testator, to be gathered from his will. I am not, however, of opinion that Sir William Grant's decision in *Welby v. Welby* is founded on the view he took in *Church v. Mundy*; in page 197 of his judgment he seems to approve of the reversal of his decision in that case, and he proceeds to say, that the decision, if against the heir at law, would leave untouched such a case as that of *Welby v. Welby*, and he expressly states, upon the supposition that there never had been a case in which general words, sufficient to include a reversion, had been controlled by reference to subsequent limitations, that he should still have held, that the will in *Welby v. Welby* was not confined to the reversion in the settled lands; for he says, that which appears to be true in the present case, that the Plaintiff is not obliged to set some parts of the will in opposition to others, but is able to contend that every disposition of the will, as well as every description in it, is applicable to the whole body of the estate.

It is also to be observed, that Lord Eldon, in *Randcliffe v. Parkyns*, no where expresses his dissent from *Welby v. Welby*. The two cases are, in my opinion, distinguishable, and perfectly consistent. I no where find that *Welby v. Welby* has been disapproved of by other Judges, and as I am unable to distinguish it from the case before me, I should consider myself bound to follow it in an analogous case, even if I had not, from the perusal of the will alone, come to the same conclusion.

I am of opinion, therefore, that a question of election
arose,

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arose, and that Sir *Robert Jukes Clifton* must be put to his election, to take under the will or adversely to it, and to make compensation accordingly.

On the second point, I am of opinion, that the recovery suffered by Sir *Jukes Clifton* and his son, the present Baronet, in *February*, 1848, cannot be considered as a binding election made by him. *Wake v. Wake* (a) and many other cases decided, that in order to constitute a concluded election, the act done must be with a full knowledge of the circumstances of the case and the rights to which the person put to his election was entitled. There is a total absence of evidence to shew that this was so in the present case; and I cannot treat the fact that a recovery was suffered of the settled lands, and money raised by mortgage of them, as proof of an intention to take against the will, with a full knowledge of all the consequences of so doing. This disposes of the main question in this suit.

The executors of Sir *Jukes Clifton*, who is dead, complain of having been made parties to this suit, to determine this question of election, and I think with reason. It is impossible to understand what interest could exist in any one to have it determined whether Sir *Jukes* held his life estate under the will of Sir *Gervas* or that of Sir *Robert*. In either event, his rights and interests were the same, and Counsel have failed in their endeavour to explain to me what the necessity was for bringing them here: no relief is prayed against him or his estate, beyond that he shall be put to his election, a prayer which, if decreed, it is obvious would not be enforced, and the refusal to do

(a) 3 Bro. C. C. 255.

do which could lead to no consequences. As against them the bill must therefore be dismissed with costs.

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With respect to the other parties who are necessary for the discussion of this question, they must have their costs, which must be paid out of any part of the testator's estate which is applicable for this purpose. If there are incumbrances on any interest brought here, I can only allow one set of costs in respect of each interest, unless by consent. I will make a declaration to the effect I have stated on the construction of the will, that a case of election arose, and that Sir *Robert Jukes Clifton* must elect, and for the consequential directions; and if any further directions are required, for the purpose of carrying into effect the trusts of the testator's will, I shall be obliged to Counsel to suggest them, and I will then dispose of them.

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1856.

ROOKE v. LORD KENSINGTON.

March 1, 3.

Two estates, A. and B., were subject to the same mortgage. The owner, on the marriage of his son, settled A. in strict settlement, and the trustees were empowered "from time to time, when and as occasion should require," to sell any part of A., and pay off the mortgage, so as to exonerate B. The owner afterwards mortgaged B. to the Plaintiff, but without any express mention of the exoneration clause. The Plaintiff having filed a bill to enforce the exoneration clause, without making the trustees of the settlement parties, it was dismissed, with costs.

Whether the Plaintiff was in a situation to en-

The time for sale would be in the A. estate.

THE late Lord Kensington had mortgaged "the Kensington estates" and "the Llanbister rectory" to Lord Braybrooke and others, to secure 60,000*l*.

Afterwards, on the marriage of the present Lord Kensington, by an indenture bearing date the 11th of October, 1833, the Kensington estates were conveyed, subject to the mortgage, to two trustees, to the use of the late Lord Kensington for life, with remainder to the present lord for life, with remainder to his first and other sons in tail, with an ultimate remainder to the late lord in fee. A power was thereby given to the late Lord to charge the estates with 20,000*l*. for his own benefit, and to create a term to secure it.

And it was thereby also provided, agreed and declared, between and by the parties thereto, that as between the heirs and assigns of the late Lord Kensington and the parties entitled thereunder, the Kensington estates should be primarily liable, and the Llanbister rectory secondarily liable for paying off the 60,000*l*.; and the trustees, Henry Handley and George Warren Edwardes were thereby empowered "from time to time, as and when occasion should arise," to sell all or any part of the Kensington estates, and out of the monies produced by the sale to pay and satisfy the 60,000*l*. and

under the terms of his security, *quare*.

for sale would seem to be, when the B. estate in the A. estate.

and interest, and to exonerate and indemnify the late Lord, his heirs, executors, administrators and assigns, and the rectory of *Llanbister* from the payment thereof.

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In 1835, the late Lord *Kensington* charged the settled states with 20,000*l.*, and created a term to secure it, and this charge, prior to 1842, was assigned to Lord *Braybrooke* and his co-mortgagees, to secure 14,277*l.*

By two deeds, each dated the 27th *January*, 1842, the late Lord assigned the 20,000*l.* charge (subject to the principal sum of 14,277*l.* 6*s.* 2*d.*), his ultimate remainder in fee in the *Kensington* estates and the *Llanbister* rectory, together with the benefit of the provision made by the settlement for charging the whole of the mortgage debt of 60,000*l.* and interest on the *Kensington* estates, in exoneration of the *Llanbister* rectory, to the Defendant *Edmond Bouverie* and others, by way of further security, for the sum of 24,500*l.* lent to him on mortgage of other hereditaments, with interest, and to the Defendants *Philip Pleydell Bouverie* and *Charles Tennant*, by way of further security for the sum of 32,500*l.* lent to him on mortgage of other hereditaments, with interest. By a third deed dated the same 27th of *January*, 1842, the late Lord conveyed to the Plaintiff *F. W. Rooke* his equity or right of redemption in the premises comprised in the other two several securities of the 27th of *January*, 1842 (but not expressly mentioning the benefit of the exoneration clause), after full payment of all the said principal sums of 24,500*l.* and interest, and 32,500*l.* and interest, by way of further security, to the Plaintiff for the sum of 30,000*l.* lent by him to the late Lord on other securities.

The late Lord *Kensington* died on the 10th of *August*, 1852, and in the *October* following, the present Lord
Kensington

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*Kensington* filed his bill to redeem the premises comprised in the settlement from the charge of 20,000*l.*, and in *March*, 1854, a decree for redemption and an account and inquiries was accordingly made, the mortgagees of the 60,000*l.* not asking to be redeemed (a). The accounts and inquiries were still pending, and the 20,000*l.* and interest remained unpaid. The 24,500*l.*, 32,500*l.* and 30,000*l.* charges, with an arrear of interest, were also unpaid.

The Plaintiff, with a view to prevent the present Lord *Kensington* from entering into possession and enjoyment of the *Kensington* estates, after paying off the 20,000*l.* charge, without obtaining an exoneration of the *Llanbister* rectory from the 60,000*l.*, filed his bill against Lord *Kensington*, his eldest son (an infant), and the *Bouveries* and *Tennant*, praying that the *Llanbister* rectory might be exonerated and discharged from the payment of the 60,000*l.* and interest, and for a sale of the *Kensington* estate for that purpose, and for an injunction and a receiver. To this bill the mortgagees of the 60,000*l.* and the trustees of the settlement were not made parties, but no objection was made by the Defendants in their affidavit on that account.

Mr. *Lloyd* and Mr. *Shapter*, for the Plaintiff, contended that the exoneration clause created a trust of which specific performance could be enforced, and that the Plaintiff was entitled to have the power of sale put in operation, in order to exonerate the *Llanbister* rectory; *Ranelaugh v. Hayes* (b). [The MASTER of the ROLLS. How can you sell the *Kensington* estates free from the mortgage, unless the mortgagees consent, or how can you proceed without redeeming them?] The Plaintiff has

(a) See 19 *Beav.* 39.

(b) 1 *Vern.* 189.

has the same benefit given to him as the *Bouveries*, except as regards priority, and therefore has the same rights, including a right to have the *Kensington* estates sold. They cited *Nisbet v. Smith* (a); *Beaumont v. The Marquis of Salisbury* (b); *Saloway v. Strawberrybridge* (c); *Dodson v. Powell* (d); *Lord Kensington v. Bouverie* (e).

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Mr. C. Roupell, for Messrs. *Bouverie* and Mr. *Tenant*.

Mr. R. Palmer and Mr. Selwyn, for Lord *Kensington*. The trustees of the settlement, and Lord *Braybrooke* and his co-mortgagees, ought to have been made parties, and the suit is defective by reason of that omission. But, even if the exoneration clause could be made available without the consent of Lord *Braybrooke* and his co-mortgagees, or without redeeming them, the Plaintiff, at least, can derive no benefit from it; for it was not assigned to him by express words, and is not included in his deed of the 27th of *January*, 1842. Besides, the trust for sale is only to be exercised "from time to time, as occasion may require," to recoup any charge that may be paid off out of the *Llanbister* tithes. How or by whom is the time of the sale to be determined? Not by the Plaintiff, and if the *Llanbister* estate is saved harmless and indemnified, the trust for sale will never arise at all.

Mr. Lloyd, in reply.

*The*

(a) 2 Bro. C. C. 582.

(b) 19 Beav. 198.

(c) 1 Kay & J. 371.

(d) 18 L. J. (N. S.), Ch. 237.

(e) 16 Beav. 194, and 19 Beav. 39.

CASES IN CHANCERY.

856.

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Lord  
Kensington.  
March 3.

*The MASTER of the ROLLS.*

I am of opinion, that this suit fails altogether. The question arising on the construction of this clause in the deed may be one of some nicety, and involve some points of considerable difficulty; but the defect which exists in the case of the Plaintiff is of this nature:—a contract having been entered into by the late Lord Kensington on the marriage of his son, that, for the purpose of exonerating and indemnifying the late Lord and his estate, called “the Llanbister tithes,” from any part of the charges which were on the Kensington estates, a trust shall be imposed on the trustees of the settlement, Henry Handley and George Warren Edwards, that they shall, “from time to time, when and as occasion shall require,” sell and dispose of all or any part of the Kensington estates, for the purpose of paying the 60,000*l.* charge in the first instance. That, as has been properly stated, is a trust reposed in these persons; and this is a suit to compel the enforcement and execution of that trust against persons who are *cestuis que trust* of those trustees in respect of this property, but not in respect of this particular contract. It is, in point of fact, a suit by a person claiming to be the *cestui que trust* of this particular contract, and seeking benefit of the enforcement of this contract, and seeking the enforcement of it by the trustees in whom the trust is reposed, but yet not calling on those trustees to exercise, or to execute or perform the contract.

Now I never saw a case of that sort before. “  
case cannot be put higher for the Plaintiff than if  
and Kensington were now alive, and had com-  
the contract. Whom would he

ch could lead to no consequences. As against the bill must therefore be dismissed with costs.

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v.  
CLIFTON.

In respect to the other parties who are necessary for discussion of this question, they must have their costs which must be paid out of any part of the testate which is applicable for this purpose. If there are incumbrances on any interest brought here, I will allow one set of costs in respect of each interest by consent. I will make a declaration to the effect I have stated on the construction of the will, the case of election arose, and that Sir *Robert Jukes* must elect, and for the consequential directions; and any further directions are required, for the purpose of carrying into effect the trusts of the testator's will shall be obliged to Counsel to suggest them, and then dispose of them.

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when did the trust which was reposed in *Henry Handley* and *George Warren Edwardes* arise? Clearly it was not a trust that was to arise forthwith, because, if so, they ought immediately to have executed it. That was not the purpose; it was to be exercised "from time to time, when and as occasion should require." Then the fact that the *Kensington* property and the *Llanbister* tithes were mortgaged to the extent of 60,000*l.*, and that there were subsequent mortgages on both, did not make the occasion then arise for the purpose of selling the *Kensington* property. For if it had been, the words "as occasion should require" would not have been inserted, but the trust would have been immediate. When were the trustees to exercise this? It being a trust reposed in them, to exercise "as occasion should require," it would probably seem to be, that the occasion would arise when it seemed probable that the *Llanbister* tithes would, in point of fact, be made liable to pay this primary charge on the *Kensington* estate. But certainly no such case is now stated; and though the mortgage to the Plaintiff was made fourteen years ago, no case is mentioned where the *Llanbister* tithes have ever been made liable for the payment of this prior charge of 60,000*l.*, nor can any reason be stated why the application should be made more at the present moment than it might have been made fourteen years ago, were it not that the Defendant, Lord *Kensington*, appears to be likely to get into possession of the *Kensington* estate himself.

But I do not hesitate to say, that if the interest on the 60,000*l.* is not kept down, then by a proper application and making the proper persons parties, the benefit of this contract might be made available for the benefit of any incumbrancers on the *Llanbister* tithes. I do not think

it necessary to pursue this further, than to state the serious doubts which I entertain of the case made by the Plaintiff, and that the persons primarily liable, that is to say, not so much the *vendees* of the power, as the trustees who are to exercise the trust sought to be enforced here, and who are to do it "when occasion shall require," are not called on to exercise or perform that trust.

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I am of opinion, therefore, that this suit altogether fails, and that it must be dismissed, with costs.

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NOTE.—The Plaintiff appealed, and the trustees of the settlement having been made parties to the suit, the Lords Justices, without hearing the Defendants, allowed the cause to stand over, on an undertaking on the part of the Defendants, or some of them, to keep down the interest on the former securities, to prove that fact half yearly, and to give notice to the Plaintiff, in case any measure should be taken for the purpose of enforcing the payment of the principal money due on the earlier securities. The Court was also of opinion, that no occasion had as yet arisen requiring a sale, and that therefore no direction for a sale ought to be given; and that there was no occasion for any declaration of right, or for an injunction or receiver, so long as the interest on the prior incumbrances was kept down. That the Plaintiff must pay the costs down to the hearing at the Rolls, and the costs of making the trustees parties, but no costs of the appeal or subsequent to the hearing at the Rolls were allowed the Defendants.

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## READ v. GOODING.

Jan. 21.

Devise in trust for *A.* for life, and, after her decease, to apply the rents for the benefit of her children, until the youngest attained twenty-five; and, as soon as the youngest should have attained twenty-five, to sell, and "pay and divide" the produce equally

"among such of the children of *A.* as should be then living, and issue of such, if any, of her children as might be then dead," such issue to take their parents' share only. Held, that the gift of the income was valid, but that the gift of the corpus was void for remoteness.

**B**Y his will, dated in 1822, the testator devised the property in question to two trustees and their heirs, "in trust, to permit and suffer my said daughter, *Sarah Hurman*, and her assigns, to receive the rents, issues and profits thereof during her natural life, and after her decease, in trust, to pay and apply such rents, issues and profits equally to or for the benefit of the children of my said daughter living at her decease, until the youngest of such children shall have attained the age of twenty-five years, in case my said daughter shall die before such youngest child shall have attained that age; but if either of the children of my said daughter shall die leaving issue, such issue shall be paid or en-

titled to the share of their deceased parent. And as soon as the youngest child of my said daughter shall have attained such age of twenty-five years (in case my said daughter shall be then dead), in trust, with a convenient speed," to sell: "And I do direct my said trustees to pay, divide and dispose of the purchase money (deducting their reasonable costs, charges and expenses), equally amongst *such of the children of my said daughter as shall be then living, and the issue of such, if any, of her children as may be then dead, but* such issue to take only their parent or parents' share or shares of the same, as if divided by virtue of the statute for distributing intestates' effects."

*Mrs. Hurman* died in 1849, leaving nine children, five sons and four daughters, the youngest child being then sixteen years old. The youngest of the surviving children

children of Mrs. *Hurman* had now attained the age of twenty-five.

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The question argued on this special case was, whether the bequest was or was not too remote, it having been held, on a previous occasion, that the gift of the income was not (a).

Mr. *R. Palmer*, for the Plaintiff, argued that the gift of the produce of the sale was void for remoteness. He referred to *Gooding v. Read* (b) and *Gooch v. Gooch* (c).

Mr. *Lloyd* and Mr. *Batten*, *contrà*, argued, that the children took absolute vested interests at the death of their parent, but that the enjoyment was postponed until the youngest attained twenty-five, at which period the issue of such as might have died in the meanwhile were to take by substitution. Secondly, that if the substituted gift was void, the prior absolute gift to the parents remained.

*Saunders v. Vautier* (d); *Milroy v. Milroy* (e); *Boston's case* (f); *Doe d. Dolley v. Ward* (g); *Leake v. Robinson* (h); *Porter v. Fox* (i); *James v. Lord Wyndford* (k).

*The MASTER of the ROLLS.*

I have no doubt that this gift is too remote. I conceive that if this gift vested in the children of *Sarah Hurman*

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|---------------------------------------------------------------|--------------------------------------------------------------------|
| (a) 4 <i>De G., M. &amp; G.</i> 510.                          | (f) 3 <i>Rep.</i> 19 a.                                            |
| (b) <i>Ibid.</i>                                              | (g) 9 <i>Ad. &amp; Ell.</i> 582.                                   |
| (c) 14 <i>Beav.</i> 565; and 3 <i>De G., M. &amp; G.</i> 366. | (h) 2 <i>Mer.</i> 363.                                             |
| (d) <i>Cr. &amp; Ph.</i> 240.                                 | (i) 6 <i>Sim.</i> 485.                                             |
| (e) 14 <i>Sim.</i> 48.                                        | (k) 1 <i>Sm. &amp; Giff.</i> 40, and 2 <i>Sm. &amp; Giff.</i> 350. |



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Hurman on her death, the attempt to substitute their children would not divest the prior gift or make it too remote. That was the case in *Milroy v. Milroy*.

Here the gift is to "the children of the daughter as shall be then living, and the issue of such, if any, of her children as may be then dead." If the question be, who are to compose the class to take? it is impossible to hold, after the decision in *Leake v. Robinson*, that this is a vested interest.

I express no opinion on the question whether the gift would or would not be too remote, if it were "to such of her children as shall be then living;" but when he adds, "and the issue of such, if any, of her children as may be then dead," it is clear that the class is to be ascertained for the first time at that period, which is after a life in being and twenty-five years; and all the cases hold this to be too remote. I am therefore of opinion the gift over after the youngest has attained and twenty-five is too remote.

NOTE.—*Bland v. Williams*, 3 Myl. & K. 411; *Kevern v. Williams*, 5 Sim. 171; *Farmer v. Francis*, 2 Bing. 151; *Davies v. Fisher*, 5 B. & C. 201; *Marquis of Bute v. Harman*, 9 Beav. 320, corrected *Southerby v. Wollaston*, 16 Beav. 166; *Newman v. Newman*, 10 Sim. 51; *Bull v. Pritchard*, 1 Russ. 213; *Palmer v. Holford*, 4 Russ. 403; *Vaudeville v. Geddes*, 1 Russ. & Myl. 203.

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In re LAW and GOULD.

A CLIENT obtained an order of course to tax *two* bills of costs of his solicitor. It appeared that the solicitor claimed *five* bills of costs against his client. Under these circumstances,

Mr. Cairns moved to discharge the order. He relied on *In re Byrch (a)*.

Mr. Bedwell, *contra*, argued that the solicitor might himself, under the 6 & 7 Vict. c. 73, obtain an order of course to tax the other bills, if he thought proper. He contended, also, that it would be a great hardship on the client, to compel him to embrace, in his order for taxation, the five bills, for the consequence would be, that he would thereby admit the retainer as to the remaining three bills, which he contested.

The MASTER of the ROLLS.

I must follow the decision of Lord Langdale, who was very conversant with questions of this description, and discharge the order, with costs.

(a) 8 Beav. 124.

Jan. 24.
A solicitor claimed five bills of costs against his client. The client obtained an order of course to tax two only. It was discharged with costs.

1856.

Jan. 18, 19,
21, 28.

HARRISON v. TENNANT.

This Court will dissolve a partnership before the expiration of the term, where the circumstances have so changed, and the conduct of the parties is such, as to render it impossible to carry it on without injury to all the partners.

The Court dissolved a partnership entered into for a term of years, when, without any breach of the partnership articles, circumstances had so altered, that it could not be carried on upon the footing originally contemplated, and the confidence mutually reposed having ceased, and given place to mistrust, so that it was apparent, that the partnership could not go on without mutual injury.

A. and B., who had been partners for some time, entered into a new partnership with C. At the same time B. took all the assets of the old firm, and covenanted to indemnify A. from the liabilities. The Court held, that the partnership between the three might be determined by the Court, for due cause, without setting aside the deed of indemnity, which might be the subject of another suit.

THE bill, in this case, prayed for the dissolution of a partnership existing between *Harrison* and *Finch* (the Plaintiffs) and the Defendant *Tennant*, and for consequential accounts, under the following circumstances:—

In the year 1851, the Plaintiff *Harrison*, and *Tennant*, who had for twenty years previous carried on an old established business as solicitors, took the Plaintiff *Finch* into partnership. The terms were regulated by an agreement dated the 8th of November, 1851, by which *Harrison*, *Tennant* and *Finch*, "agreed to enter into copartnership together, as attornies, solicitors and conveyancers, for the term of twenty-one years, to commence on the 1st of January, 1852." The agreement then regulated the shares and capital, and provided that *Harrison* and *Tennant* should devote only so much time and attention to the business as they, in their discretion, should think reasonable, but that *Finch* should devote his whole time, attention and energies thereto. If *Harrison* or *Tennant* should die in the life of *Finch*, the survivor was to be at liberty, without the consent of *Finch*, to introduce a lineal descendant into the firm. If both

th *Harrison* and *Tennant* should die in the life of *Finch*, without having exercised that power, whereby the whole business should devolve on *Finch*, he was to pay to the widow or children of *Tennant* an annuity of 500*l.* a year for the remainder of the twenty-one years. The articles then provided as follows:—"That *Harrison* and *Tennant*, or the survivor of them, shall have power to terminate and make void these articles of partnership at any time, on giving notice in writing to that effect, the party receiving such notice to cease to be a partner," and receiving 500*l.* for his profits for the current year, and his capital. "In case of any dispute between the said parties, the same to be referred to arbitration in the usual way. Any partner hereafter to be appointed acting in wilful breach of these articles or misconducting himself, to be liable to be dismissed in the usual way as the other partners, or partner if only one partner."

By an indenture of even date, and made between the same parties, it was agreed, that *Tennant* should hold the estate of the preceding firms for his own benefit, and in consideration thereof, he covenanted to indemnify *Harrison* from all debts and liabilities of the preceding firms.

The partnership was accordingly carried on, but disputes arose between them, which gave rise to this suit, under the following circumstances:—The Earl of *Jersey* had been a client of the preceding firms from the year 1813 until 1845, when he retained other solicitors. The Earl had sold the *Britton* Ferry estate for the Earl, and the father of the Defendant *Tennant* (who was then partner, but had died in 1832) principally attended the Earl's affairs. These were of great magnitude, and it was stated, that about a million sterling had passed through his hands from first to last, for purchase-money,

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money, rents, &c., but no account had been settled during the whole time. Disagreements had arisen between the Earl and the firm as to these extensive and complicated transactions, and in *May*, 1845, Mr. *Tennant* delivered accounts of the sales, the general accounts and the bills of costs. These were not satisfactory, and after communications, explanations and controversy between the Earl's solicitors and *Tennant*, the Earl filed his bill in *October*, 1852, against *Harrison* and *Tennant*, impeaching some sales made to the Defendant's father, and praying accounts. Counsel suggested a compromise, but *Tennant* refused to accede to this, and put in his answer, without the concurrence of his partners. Amongst other charges, the Earl had complained of the amount of commission of 5*l.* per cent. on the sales of the estate down to 1822, which exceeded 13,000*l.*, and was in addition to office bills. In answer to this, *Tennant* in his answer said, that the charge had been made with the Earl's concurrence, that it had been charged in an account book now in his possession, which he had frequently seen his father hand to the Earl, who examined the same. Upon production of this book, however, the paper of which it was composed bore the water-mark of 1830. This matter being introduced by amendment, the Defendant adhered to the statement, but said that the book must be a copy made by his father of the original, but that he could not find it.

Again, the Defendant, in his original answer, in order to enhance the value of the services of his father, stated, that the Earl had been willing to sell the estate for 200,000*l.*, and that his father, by his judicious arrangements, had obtained 300,000*l.* for part only, and in one of the books there was, in the writing of the firm, an entry of an offer by a gentleman of 200,000*l.* for the whole estate, which had

had been refused. It appeared that the first figures (20) had been written on an erasure, and from other sources it appeared that 350,000*l.* had really been offered. There was another charge against the Defendant of having charged 7,560*l.*, as received by his father for deposits on sales, when they had been received for reserved rents, and that he had made a claim for 16,000*l.*, which was not entered in the books, and one or two minor matters, which it is not necessary to state.

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The Earl had introduced these matters into his bill by amendment, but he did not require any further answer. The Defendant insisted, however, on putting in a further answer. His partners interfered and wished it to be settled in consultation, whereupon the Defendant made himself the sole solicitor on the record in lieu of the firm, and put in his answer without further consulting his partners thereon.

The present bill, filed in *May*, 1855, after detailing these matters of complaint, stated as follows:—"In addition to the several circumstances hereinbefore stated, the Plaintiffs have grave cause of complaint against the Defendant *Tennant*, in respect of the general character and conduct of the defence adopted by him, in and by his answer and further answer" to the bill, and in the said suit instituted against him by the Earl of *Jersey*, and they submit that his conduct "was and is inconsistent with his duty as a partner of the Plaintiffs in their profession," and, as evidence of such conduct, the Plaintiffs refer to the said several answers of the said Defendant to the said original and amended bills. That in consequence of the several matters the Plaintiffs were advised, that they ought to effect a dissolution of their said co-partnership with *Tennant*.

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The bill prayed a dissolution of the partnership and for accounts.

It appeared that *Harrison* and *Finch* had, soon after instituting this suit, sent a circular to the clients of the firm, stating that they had instituted proceedings to dissolve the partnership in consequence of the "grav charges" made against Mr. *Tennant* in the suit of *Ear of Jersey v. Tennant*, and the manner in which he had met them, and trusting that this "would not impair the confidence hitherto reposed in them."

Mr. *Lloyd* and Mr. *Fleming*, for the Plaintiffs, argued that, in the present state of circumstances and feelings, it was impossible that the partnership could continue to be carried on, and that the authorities embodied a general principle, that a contract of partnership would not be continued to the injury of all concerned in it, when it was clear, from violent causes of dissension, that they could not act in harmony together.

They cited *Collyer on Partnership* (2nd ed.) (a); *Baring v. Dix* (b); *Waters v. Taylor* (c); *De Berenger v. Hammel* (d), and commented on the acts complained of.

Mr. *Roupell* and Mr. *Shapter*, for the Defendant. There must be some breach of the express or implied contract between partners to justify the Court in setting aside and terminating a partnership which the parties have expressly engaged to carry on for a fixed number of years. Here there is not even an allegation of any breach of the partnership articles, or of any misconduct in the management

(a) Page 193.
(b) 1 *Cox*, 213.

(c) 2 *Ves. & B.* 299.
(d) 7 *Jarm. Conv.* 26.

ment of the present partnership, nor is there any interruption of intercourse between the partners. As to *Harrison*, it was more his duty to have seen that the affairs of Lord *Jersey* were regularly entered than the Defendant, who did not become a partner until 1832; besides, the Defendant has engaged to indemnify *Harrison*, who, therefore, cannot be damnified by the result of that suit. The Plaintiffs have shewn an undue haste in filing the present bill, which is founded on charges made in another suit, which not only still remain unproved, but are positively denied on oath; the Defendant must be assumed to be innocent until judicially found to be guilty. The existence of charges in another suit, instituted by another party, cannot be a ground for dissolving this partnership; for if a decree were made for the Plaintiffs in this suit, it must be based on the unproved charges in the other.

They commented on and explained the several charges which were denied or explained, and insisted that the mere erroneous statements of ancient transactions, in which the Defendant's father, and not the Defendant, had been engaged, were not of the serious character to justify the rescinding of a partnership contract; besides which, they did not really affect the merits of the other suit. They argued that the conduct of the Plaintiffs was highly improper, in sending a circular to the clients of the firm, with the object of supplanting the Defendant, and depriving him of his clients, and they insisted that the law was not that a partnership was to be dissolved if it were impracticable for it to go on, where the difficulty arose from the conduct of the person seeking the dissolution. They argued that the partnership could not be dissolved without setting aside the contemporaneous deed of indemnity, and urged that *Finch* had purposely picked a quarrel with the Defendant, in order, upon the death

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death of *Harrison*, who was now seventy-eight years of age, to secure to himself the whole of an old established business.

They cited *Goodman v. Whitcomb* (a); *Marshall v. Colman* (b); *Wray v. Hutchinson* (c); *Smith v. Jeyes* (d); *Hall v. Hall* (e); *Ogilvie v. Gregory* (f).

The MASTER of the ROLLS said he would consider the case before he called for a reply.

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The perusal, which I have had the opportunity of making very carefully since this case was heard, has convinced me, that it is impossible for this partnership to continue.

There are two principles on which the Court will dissolve a partnership contract, both of which, to some extent, exist in the present case; they combine and co-operate together, and lead me to the conclusion to which I think it necessary to come. One is, the alteration of circumstances, subsequently to the entering into the partnership; and next, the conduct of the partners themselves.

I will, in the first instance, look at this case so far as Mr. *Finch* is concerned, because this is clear, that there be no partnership so far as he is concerned, there can be none so far as regards Mr. *Harrison*; it must be put an end to altogether.

With

- (a) 1 *Jac. & W.* 589.
- (b) 2 *Jac. & W.* 266.
- (c) 2 *Myl. & K.* 235.
- (d) 4 *Beav.* 503.

- (e) 20 *Beav.* 139, and 3 *M. & Gor.* 79—86.
- (f) *V. C. Wood*, 17 Jan. 1856.

With respect to the alteration of the circumstances, I have to consider, whether the partnership can be carried on as it was originally contemplated by the persons who contracted to become partners. The partnership contract was in *November*, 1851, and the position of the parties, at that time, was as follows:—*Mr. Harrison* was of an advanced age, and *Mr. Tennant* was engaged in a contest with *Lord Jersey*, the character of which, as I infer from the evidence before me, had not been fully ascertained. Previous attempts had been made to compromise, and it might reasonably have been expected that this might have been settled. The letter of the 5th of *December*, 1851, of Messrs. *Frere & Co.*, to *Mr. Tennant*, which shewed the serious character of the contest, was subsequent to the entering into these articles of partnership, although previous to the commencement of the partnership, on the 1st of *January*, 1852. These negotiations came to nothing, and in *October*, 1852, the bill of *Lord Jersey v. Tennant* was filed, which was certainly of a very serious character, and then, for the first time, *Mr. Finch* must have become acquainted with the full extent of the matters involved in that suit, though, no doubt, he had a general knowledge of them before, because he had, for ten years, been managing clerk to the firm, and must have known generally what was taking place; though *Mr. Tennant* says, that *Mr. Finch* knew nothing about them. However, matters gradually became more serious, the answer was not put in until *December*, 1853, so that it required upwards of two years to put in a sufficient and proper answer; this again shews the serious character of the suit. The anxiety of *Mr. Harrison* and *Mr. Finch* as to these matters is shewn by their consulting Counsel, without the knowledge of *Mr. Tennant*, which is one of the matters he complains of. It became at once apparent that *Mr. Tennant's* whole time would be necessarily

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necessarily occupied in preparing the defence, and thus withdrawn from the partnership. It has been urged, no doubt with great truth, that the partnership articles provided for this very thing, by stipulating that Mr. *Harrison* and Mr. *Tennant* should only be obliged to give such time and attendance to the affairs of the partnership as they might think fit; but still Mr. *Finch* knowing the ability and anxiety with which Mr. *Tennant* had previously carried on this business for a great number of years might reasonably have expected to receive very great assistance from him in carrying on the partnership business, though he had not a right positively to demand it, but the nature and continuance of this suit shewed but little prospect of his obtaining any, and any expectation so formed would undoubtedly have been fallacious. Now, undoubtedly, this alone would be nothing, but I mention it merely in the outset as a part of the substance, which combines with the rest of what I am going to state.

The suit of Lord *Jersey* v. *Tennant* became more serious, the bill was amended and the amendments undoubtedly contain matter which might reasonably have occasioned great and painful surprise to the partners of Mr. *Tennant*. The bill before me contains six distinct charges against Mr. *Tennant*, but it is only necessary for me to refer, for instance, to the two most serious ones.

Mr. *Tennant*, in his answer to Lord *Jersey's* bill, states, that he saw a particular book, which he describes, handed to Lord *Jersey* in *June*, 1826, and that Lord *Jersey* admitted the propriety of an item contained in it, and that he authorized or made a payment of 5,000*l.* upon the strength of that admission and in consequence of the entry in that book. On the production of the book

book itself, it appears, that it could not have existed before the year 1830. Now, Mr. *Tennant*, in answer to this charge, says, that it must have been a copy of this book which he saw shewn to Lord *Jersey*, but that he has not been able to find the original of that book; but no proof of its existence is given, nor any explanation why a copy should have been made of this book in particular.

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The other instance is the alteration of an item in one of the books kept by Mr. *Tennant*, containing the accounts of the Earl of *Jersey*, by changing the two first figures of a sum, which appears now to be 200,000*l.*, but which, from the corresponding entry in another book, which I think is the office attendance book, it is pretty clear, must have been originally 350,000*l.* This alteration is admitted by Mr. *Tennant* to have been made by him, he is unable to remember when it was made, or under what circumstances; but he has no doubt it was made for the purpose of making the book what he believed to be correct. It is contended, undoubtedly, that that alteration is of no moment, because, so far as the charge by the firm is made, the charge would be exactly the same whether the offer made for the estate was 200,000*l.* or 350,000*l.* On the other hand, it is contended, that this is a matter of some moment, because, in the defence to the suit of the Earl of *Jersey*, Mr. *Tennant* enhances the value of the services of his father in this matter, by the fact that Lord *Jersey* was willing to have sold the property for a small sum, comparatively speaking, to that which it afterwards produced; and that if he was willing to have sold the property for 200,000*l.* or 250,000*l.*, it is somewhat hard to take harsh proceedings against a solicitor who had sold a portion of the property for 450,000*l.*, and left the remainder of the property producing upwards
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of 10,000*l.* a year. I think it unnecessary to state these things further for the purpose of what I am about to mention.

Now these circumstances might, in my opinion, naturally alarm both Mr. *Harrison* and Mr. *Finch*, and accordingly they seem thereupon to have resolved, that as this was a matter which, as it might involve the character of one of the partners of the firm in which they were materially interested, and thereby might affect them, it was important that the sole conduct of the defence of Mr. *Tennant* to the suit of Earl *Jersey* *v.* *Tennant*, ought not to be exclusively entrusted to Mr. *Tennant*, but that they ought to be allowed to take a part in it; and they thereupon instructed Mr. *Shapter* not to settle the answer until he had had a consultation with Queen's Counsel. Upon this, Mr. *Tennant*, as he was entitled to do, being the Defendant upon the record, changed the solicitors, by making himself the sole solicitor on the record for himself, and he instructed Mr. *Shapter* to complete the answer, which he did immediately, on his own responsibility. There are, no doubt, many very good reasons given for that step; in the first place, the time for answering was very short, and it was a matter of great importance that it should be done very speedily.

In this state of things, the result appears to me to be, that the confidence mutually reposed in each other, when the partnership was originally formed, must have ceased, and that it is now impossible that the business can be conducted as it was originally contemplated, and, although, the parties to this suit being gentlemen, no outbreak of any sort has occurred between them, yet nevertheless the attempt to compel them to act as partners for the future would, as against them all, be
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to compel them to inflict irreparable injury upon each other. Nay, I should infer from the evidence, that the continuation of the partnership by itself is not desired by Mr. *Tennant*, but that what he resists is, the attempt to dissolve it, if such dissolution is to be based on his individual acts, or in respect of any alleged misconduct on his part. Now, I say, I draw this inference from the evidence which he gives, for he states that Mr. *Finch* was an artful and designing person, that he early formed an unfavourable opinion of him, from the manner in which he endeavoured to wheedle himself into Mr. *Tennant's* good opinion, and to supplant Mr. *Harrison*, and this long before the partnership was formed; and that when he did enter into the partnership, it was at the request and at the earnest desire of Mr. *Harrison*, and, that, on that ground alone, he admitted him into the partnership, and that he would never have consented even then to have done so, unless it had been under the express condition, that he might reserve to himself the power of excluding Mr. *Finch* from the partnership at any time upon the decease of Mr. *Harrison* taking place.

Now it is not necessary, nor would it be proper with this view, to refer to what has since taken place, further than this, that it convinces me, that the breach is irreparable on both sides, and confirms the view of the feelings and the want of confidence which must necessarily exist between these parties, rendering the conduct of the business together impossible. [*His Honor next referred to a circular by Mr. Harrison and Mr. Finch to the clients, and expressed his strong disapproval of it.*]

It is true, as has been very justly observed, that no party is entitled to act improperly, and then to say, the
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conduct of the partners, and their feelings towards each other, are such that the partnership can no longer be continued, and certainly this Court would not allow any person so to act, and thus to take advantage of his own wrong. But this is not that simple case, and the circumstances I have already referred to shew, that the conduct on both sides has produced this state of things.

It is urged, that the *animus* with which this suit is instituted is obvious, from the haste in which it has been instituted and hurried on; so as to obtain a priority over the suit of *The Earl of Jersey v. Tennant*, and that the Plaintiffs ought not to have assumed, that the truth of the charges made by that bill, and which are repeated by the present, would be established in the case of *The Earl of Jersey v. Tennant*, but that they ought to have waited until, at the hearing of the cause, the truth or untruth of the charges had been determined; that this is, in truth, an attempt to prejudice Mr. *Tennant* in the suit, in which the solicitors of Lord *Jersey* are, in fact, concurring and assisting; and that every one must be treated to be innocent until he is proved to be guilty. This, undoubtedly, was urged with great vigour and ability before me in the argument. I expressly state, that I intend, in the present case, and in the observations I am now making, neither to say nor to do anything which can, in the slightest degree, affect the suit of *The Earl of Jersey v. Tennant*, either directly or indirectly; and I shall certainly not express, even if I had formed, which I have abstained from doing, any opinion as to whether any degree of credit is justly attributable to the charges against that gentleman, the Defendant in this suit.

But it is reasonably obvious to any one versed in the course which a cause of that nature takes in this

Court, that in all probability, the validity or invalidity of the personal charges against Mr. *Tennant* never be determined or possibly discussed in that

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The Court will, in all probability, direct some amount to be taken, with or without special directions, except in the discussion of the items, and in taking accounts, and then partially and incidentally, if at no matter of conduct can ever come into ques-

I repeat that I express no opinion whatever on the charges, and that I have not the means of accurately forming one; still I cannot but feel, that these charges, and the circumstances connected with them, the mode in which they are brought before me, may reasonably, to some minds, have produced that mistrust which exists in the present case between the parties, which has led to the hostility of feeling on both sides, which, in my opinion, exists, and which, in my opinion, has made it impossible that this partnership should longer be continued, with advantage to any of the persons concerned.

is asked, is Mr. *Finch* to have the benefit of the whole business? Is he to come in under the wing of *Harrison*, and on his early death or retirement, which is probable, he being a gentleman of an advanced age and infirm, to take the whole of the business of a great and distinguished firm to himself, and thus support the very persons to whom he owes everything in connection with this partnership. Now, undoubtedly, any decree could lead to that result, I should pause considerably before I attempted to do anything of that description, whatever might be the difficulties of the position in which I was placed; and I have endeavoured to state this argument as strongly as it was pressed on me. But it is impossible for me to speculate what such would be the result of the decree I have

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to make. I am not to suppose, that the clients of a long and well-established firm, which has, for many years, been entirely dependent on the exertions of Mr. *Tennant* and his abilities alone, which is shown by Mr. *Finch's* own letters, will abandon him in consequence of the dissensions between himself and his present partners. in which, in my opinion, it is impossible to say that either party is wholly free from blame.

It has been further observed, that a deed was executed contemporaneously with the partnership articles, by which the assets of the old firm, together with liabilities, were exclusively taken upon himself, by Mr. *Tennant*, that this was a part of the same transaction, and that this cannot be allowed to stand if the partnership be dissolved. Upon this part of the case I express no opinion; it does not and it cannot properly form part of the case before me. If, as its date would seem to infer, the fact be, that this deed was a part of the same arrangement, it ought, if the partnership fall, to fall with it; but unless this matter be settled, by arrangement out of Court, it must be the subject of a separate suit. I cannot, in this suit, order that deed to be cancelled, nor can I make any declaration respecting it.

All that I can do and all that I profess to do is to say, that in the existing state of circumstances, feelings and conduct of the partners, the partnership cannot be conducted without ruin to all the persons concerned in it, and that it ought to be dissolved.

I do not base my decision upon any particular reported case, but upon the principle, that the circumstances under which the parties entered into the partnership have, by matters over which they have no control, materially

materially altered, that these altered circumstances have, combined with the conduct of the parties themselves, produced a mistrust which the Court cannot say is unreasonable; and that, taking all these things together, it is impossible that the partnership can be conducted upon the footing on which it was originally contemplated, without injury to all these persons concerned, and that, taking all these matters together, it makes this a case, in which, in my opinion, it is the duty of the Court to pronounce a decree for the dissolution of the partnership.

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COOKE v. GITTINGS.

THIS was a plea to a bill of revivor, which stated that the Plaintiffs had instituted their suit against *James Gittings* and others in 1854. That *James Gittings* appeared and answered the bill, after which, on the 12th of *April*, 1855, the Plaintiff amended his bill against *James Gittings* and the others.

The bill then alleged as follows:—Previously to the said amended bill having been filed, and on the 6th day of *April*, 1855, *James Gittings* departed this life, whereby the original suit became abated as to him; and *James Gittings*, previously to his decease, made and executed his last will and testament, dated the 20th day of *March*, 1855, and thereby he appointed his wife, the Defendant *Caroline Gittings*, sole executrix, and *Caroline Gittings* has, since the decease of *James Gittings*, taken on herself the execution of the said will of *James Gittings*, and has possessed herself of the personal estate and effects of *James Gittings*, and has taken on herself the administration thereof.

Jan. 28.

A bill of revivor against *A. B.*, alleged that a Defendant to the original bill had died, having by his will appointed *A. B.* executrix, and that she had taken on herself the execution of the will, and had possessed the assets and taken on herself the administration thereof. It prayed revivor against her as such executrix. *A. B.* pleaded simply that she was not executrix. The plea was allowed.

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Under the circumstances aforesaid, the Plaintiffs are advised that they are entitled to have the said suit and proceedings revived against *Caroline Gittings*.

The bill prayed a revivor against *Caroline Gittings*, as such executrix, and that she might admit assets of *James Gittings* or account for his personal estate.

To this bill the Defendant *Caroline Gittings* pleaded, "I am not the executrix of *James Gittings*, deceased, in the Plaintiffs' bill named as in the Plaintiffs' bill alleged."

Mr. *C. C. Barber* in support of the plea. This plea is sufficient: it is, if true, a complete answer to the bill; *Hill v. Neale* (a); and the form is correct; *Fry v. Richardson* (b). It is not necessary to deny possession of the assets, for if that were stated in the plea, it would make it double and informal. If this were a suit against the Defendant as executrix *de son tort*, the legal personal representative would be a necessary party; *Creasor v. Robinson* (c).

Mr. *Bagshawe* and Mr. *Goren*, in support of the bill. The plea is insufficient; there is no answer to the allegation as to the testator's will, or to the statement that the Defendant has taken on herself the execution of the will, and has possessed the testator's assets. If that be true, she is executrix *de son tort* and accountable. "If executors elect to act, they are liable to be sued before probate, and cannot afterwards renounce;" *Blewitt v. Blewitt* (d).

The Vice-Chancellor of *England* stated the doctrine in

(a) *Mitf.* 276, n. (5th ed.).
 (b) 10 *Sim.* 475.

(c) 14 *Beav.* 589.
 (d) *Younge*, 543.

Strickland v. Strickland (a), thus:—"The bill further shews, that Sir George had possessed certain of the lands of Sir William; and, as it so alleges, it throws upon Sir George the character of executor of Sir William, and makes it imperative upon him, in order to meet the objection in the bill, that he became the personal representative of Sir William Strickland, not only to shew that he renounced the probate of Sir William's will both in the lifetime and also after the death of Sir William, but also to aver that he never intermeddled with the estate of Sir William, for that averment gets the conclusion of law which must have been drawn from the statement in the bill of revivor, which amounts to saying having taken upon himself the character of executor of Sir William Strickland."

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The objection as to want of parties is not raised by the plea.

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The plea meets the only case made by the bill, which is:—[*His Honor read the passage.*] This means that in her character of executrix she has taken on herself the execution of the will and possessed assets. That is, it depends on her being executrix, and the bill prays a decree for or against her as such executrix. The whole scope of the prayer of the bill is in case of making a case against her as executrix, and not as executrix *de son tort*, in which it would be a question whether it would not be allowable, and whether it ought or ought not to be allowed merely against her. I am of opinion that this must be allowed. I cannot give leave to amend.

(a) 12 Sim. 261.



1856.

Feb. 7.

Motion by Defendants to stay proceedings in a suit, upon certain terms, on the ground that the same questions were in issue in a suit instituted by them against the Plaintiffs in *Scotland*, and which the Court had refused to stay, refused with costs.

A. proceeded against the executors of *B.* in *Scotland*. In a creditor's suit in this Court by the executors, *A.*'s proceedings were restrained by injunction, but after three years' delay, the order was reversed on appeal. In the meanwhile, the executors had instituted a suit here against *A.* on the same subject. It

having been held, that *A.* had a right to proceed in *Scotland*, he moved to stay the executors' proceedings here, until the question had been decided in *Scotland*. The motion was held irregular, and refused with costs.

STANTON v. The CARRON COMPANY. (No. 3.)

THIS was a motion, on the part of the Defendants, to stay the proceedings in the cause on terms, and under the following circumstances:—

In 1851, *Henry Stainton* died. He was the London agent of the *Carron Company*, a *Scotch* corporation. After his death, disputes arose between his representatives and the Company. In one view, he was indebted to the Company in 69,617*l.*, in the other, he was a creditor to the extent of 4,018*l.* At his death, he held shares in the Company valued at about 80,000*l.*, on which the Company, under the terms of their charter, claimed a lien.

In 1852, the executors of *Henry Stainton* obtained in this Court (*Maclaren v. Stainton*) a decree for the administration of his estate, and in the same year the Company commenced proceedings in *Scotland* against the executors to recover their alleged debt: whereupon, this Court (as it usually does, as against the creditors in this country of an estate under administration by the Court) granted an injunction to restrain the proceedings of the Company in *Scotland*. The Company moved to dissolve, when the motion was refused. The

Plaintiffs

NOTE.—These matters have been before the Court on several previous occasions, see 16 *Beav.* 279, 18 *Beav.* 146, and *ant*2, p. 152.

Plaintiffs in *Maclaren v. Stainton* enrolled the order, and the Company appealed at once to the House of Lords. The appeal could not be heard until *July*, 1855, when the order was reversed, and the injunction dissolved. The proceedings in *Scotland* having in the meanwhile dropped, and as they could not, according to the practice of the Court of Sessions, be revived, the Company, in *July*, 1855, instituted a second suit against the executors in the Court of Sessions in *Scotland* for the same purpose, which this Court refused to restrain (*a*).

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The present suit of *Stainton v. The Carron Company* was instituted in *February*, 1854, after the allowance of a demurrer in another suit (*b*), and its object was, to have the accounts taken and the shares transferred.

A motion was now made, on behalf of the Company, that all further proceedings in this suit might be stayed until the final decision of the action instituted by the *Carron Company* in *July*, 1855, in the Court of Sessions in *Scotland*, the *Carron Company* undertaking duly to prosecute the action, and also, on payment to them of the amount for which judgment might be obtained by them in the action, or (in the event of the action failing) forthwith to allow the Plaintiffs to transfer the testator's shares in the Company, and pay to the Plaintiffs the dividends thereon, and the balance in the said bill claimed as due to his estate in respect of ^A the open or private account."

An affidavit was filed, shewing that the suit in *Scotland* might be decided in the present year; that by the law of *Scotland* agents might be charged 5*l.* per cent.
 on

(*a*) *Ante*, p. 152.

(*b*) 18 *Beav.* 146.

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Company.

on their balances; that lapse of time was no defence unless a delay of forty years had occurred, and the greater convenience of trying the questions in Scotland.

Mr. Rolt and Mr. Cotton, in support of the motion. The Defendants submit to every thing, except that which is in contest in Scotland, and which, it has been determined, the Scotch Courts are the proper *forum* for deciding. There is no question in these proceedings beyond that in Scotland, except as to the right of the Company to a lien for their debt, if any should be held to exist.

Where an erroneous order has been made here, which has been reversed elsewhere, it is the duty of this Court, and its practice, "as far as possible, to place the Defendants in the same situation in which they would have stood, if the order which the House of Lords disapproved of had never been pronounced (a);" and this Court is "bound, so far as possible, to reinstate the Defendants in the position in which they would have been if the injunction had never been granted (b)." The Scotch Courts first assumed jurisdiction over the matter in question, the suit there has priority over the present, and but for the injunction and the delay in hearing the appeal, it would long since have been determined.

Unless, therefore, the Court makes the order now asked, the delay of the House of Lords in hearing the appeal, and the erroneous order of this Court, will give to the Plaintiffs that, which the judgment of the House of Lords has held them not entitled to.

The

(a) *Ante*, p. 159.

(b) *Ibid.* p. 160.

The House of Lords and the Court of Appeal thought that *Scotland* was the proper *forum* for deciding the questions in controversy between the parties, and that it could be more properly tried in *Scotland* than here. The corporation, the contract and the subject of it are Scotch, the place of payment is *Scotland*, and the validity and interpretation of the contract must be determined by the law of *Scotland*, and not by that of *England*; *Story's Confl. (a)*; *Rothschild v. Currie (b)*. Again, if the question be tried here, the Plaintiffs will avail themselves of the English Statute of Limitations of six years, as incident to the remedy, which depends on the tribunal in which the case is to be tried; *British Linen Company v. Drummond (c)*. Will this Court allow a debtor to drag his creditor into a foreign country for the decision of a question between them, where a foreign statute bars the creditor's remedy, though it would be inoperative before the legitimate tribunal? Considerations of convenience also require that the matter should be determined in *Scotland*, where the books and accounts are kept, which cannot be removed without the greatest inconvenience, and where the principal witnesses reside.

If there were two suits, one here and one in *France*, respecting a matter of French law, this Court would, at the hearing, direct the rights of the parties to be decided in *France*, and retain the bill until the right had been ascertained there. So when the relief depends on a legal right: the cause stands over, and is not heard until the legal right has been ascertained before the proper legal tribunal; *Rodgers v. Nowill (d)*.

It is not necessary to institute a suit for the purpose of obtaining the present order. It is a question of form,

(a) Sect. 270, 304 a, 363.

(b) 1 Q. B. Rep. 43.

(c) 10 Barn. & C. 903.

(d) 6 Hare, 325.

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form, and the Defendant is asking the Court to regulate its own proceedings, which it has full jurisdiction to do, and which it frequently exercises upon an interlocutory application, as in cases of election and staying a suit upon the Defendant's submission. What objection can there be to make, upon this motion, the same order as would be made at the hearing, and save the useless expense of continuing the proceedings in this suit for no purpose?

Mr. *R. Palmer* and Mr. *Kenyon*, *contra*, were not heard.

The MASTER of the ROLLS.

This is an application which is perfectly novel in its nature, and appears to me wrong, not only upon the merits, but in point of form. It is, in fact, an application to stay a suit, not only on the ground that the Plaintiff has not any equity against the Defendant, which might, if such had been the case, have been disposed of by demurrer, but upon the ground that the Defendant has instituted proceedings in another country for the same subject matter in dispute between them, which can be more conveniently or more properly be tried in that country. Mr. *Rolt* was unable to refer me to any reported decision, in which this Court had ever been induced to adopt such a course of proceeding, and I remember none.

This, in fact, is a motion by the Defendant to stay all the proceedings in this cause. It is true, that it is coupled with an undertaking to do certain things which it is proposed shall be incorporated in an order or decree. Now, to say that the Plaintiff has no right to have the assistance of this Court to enforce an equity to

to which he is entitled, because proceedings have been taken in another country, in which the matter may be tried, is a proposition perfectly new to me. Undoubtedly, if any such application could be made, it could only be made on a bill being filed by the Defendant for that purpose, seeking relief on the matter.

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It is true, that a Defendant does frequently apply to stay proceedings in the cause, but he does so on grounds perfectly distinct from those upon which this application is made. If a Plaintiff is pursuing the Defendant at law and in equity for the same subject matter, the Defendant is entitled to put the Plaintiff to elect which of the two he will proceed upon; so that the Defendant may not be vexed by a double proceeding. That is perfectly distinct from this case. A Defendant may also come and say, "I am willing to give the Plaintiff all he asks;" and thereupon he is entitled to stay the proceedings; but it is perfectly new to me for a Defendant to come and say, "I am willing to give the Plaintiff all he asks, except the only subject of contest between us," and to ask that the proceedings may be stayed, on the ground that there are proceedings in another country. In point of fact, it is the same as if the suit were for that sole matter, because that is the sole matter which is disputed and to be discussed between them.

It suggested that this should now be treated as the hearing of the cause; but it is obviously impossible for the Court to determine the merits on the application of a Defendant, prior to the cause being ripe for hearing and the evidence taken. Mr. Cotton has gone into a long argument and cited cases, (which only convinces me of the impossibility of my making, consistently with justice, an order to the effect which he asks)

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asks) to shew me that I should determine one matter which is the subject of dispute between the Plaintiff and Defendant, and that I ought to come to the conclusion, that the decree of this Court will ultimately determine that the law of *Scotland*, and not that of *England*, is to regulate the matter in dispute between the parties.

That may be so. This Court may have to determine that question, but I cannot determine it until the matter comes before me for judicial decision in a regular and proper course, at the hearing and upon the proper evidence. I cannot determine this upon an interlocutory proceeding, and still less can I say, that the Plaintiff shall not be at liberty to make out his case in such manner as he may think fit, and to have the decision of this Court at the hearing of the cause, whether, in the opinion of this Court, the law of *Scotland* ought to apply or not.

Mr. *Cotton* then suggests this:—that in *December*, 1852, this Court miscarried, by restraining the present Defendants from proceeding in their action in *Scotland*, that by reason of the delay of the House of Lords in deciding the appeal, a considerable length of time was lost, and that this Court ought to be very desirous to repair the injustice which it may thereby have created, and put the Plaintiffs in *Scotland* in the same situation in which they would have been if such erroneous order had never been made. But it is to be observed, that it was not, properly speaking, either the act of the Court, or the act of the Plaintiff in equity. No doubt this Court is very desirous, where its decision has been reversed, to put the parties in the same situation, as far as it possibly can. But why did the present Defendants choose to go to the House of Lords? Their
 answer

answer is, because the Plaintiffs in equity had enrolled the order of this Court. But why did they not stop the enrolment of that order by entering a *Caveat*? They would then, in the course of a month or two, have had the matter brought before the Lords Justices, and a decision in their favour would have put them exactly in the same situation, at most with the delay of two or three months. They thought fit to adopt the other course; and I cannot say, that this Court is to violate those principles of equity and form, and to hold, that because the Defendant thinks the case will be more satisfactorily tried in another tribunal, in which he has instituted proceedings, and which he is at full liberty to continue, this Court will thereupon, on an interlocutory application, determine in his favour that which can only properly be determined at the hearing of the cause, and grant him an injunction and substantial relief when no bill is instituted by him praying any such relief.

It seems to me, that the application is replete with defects of all descriptions; I cannot make any order on this motion, which must be refused with costs.

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PRICE v. LOADEN.

Feb. 11, 12.

A trustee unreasonably resisting the claims of his *cestui que trust* ordered to pay the costs of the suit.

A trustee in two independent matters for the same person is not justified in mixing up the two transactions, and refusing to pay over the first trust fund until all questions as to the second have been settled.

UNDER the settlement made on the marriage of her parents, in 1793, the Plaintiff was clearly entitled to a sum of 179*l.* Consols. This was standing in the name of the Defendant *Loaden*, the trustee, and he admitted her right thereto.

The Defendant had also in his hands, as trustee, a separate sum of 1,346*l.* 8*s.*, under the following circumstances:—This sum originally stood in the joint names of the Plaintiff's father and mother. Her father died in 1838, upon which her mother became entitled to the fund, by survivorship. The Plaintiff and her brother, however, agreed to conceal the fact from their mother, to pay her a sum of money as if they were dividends, and, after her death, to divide the fund. The Plaintiff's brother died in 1840, and her mother then discovered her rights, and claimed the fund. A deed was executed by the mother in 1847, by which the fund was vested in the Plaintiff and Defendant in trust, to pay the dividends to the mother for life, and after her death, for the Plaintiff absolutely.

The mother died in 1853, when both funds were claimed by the Plaintiff. The Defendant raised some question as to the rights of the Plaintiff's brother, but they were withdrawn by his representatives. The Plaintiff agreed that the second fund should be paid into Court, but required the Defendant to pay over the first fund. This he refused to do, unless the Plaintiff entered into a covenant to indemnify him against any claims in respect

respect of the dividends of the second fund which he had paid over.

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After a long correspondence and a futile negotiation, this bill was filed, solely to recover the first fund of 179*l.* Consols.

Mr. *R. Palmer* and Mr. *Terrell*, for the Plaintiff, asked that the Defendant might pay all the costs of the suit, to which there was no possible defence; for the Defendant was entitled to no indemnity as to the second fund, and could not mix up two separate transactions.

Mr. *Lloyd* and Mr. *Smythe*, for the Defendant, argued that the trustee was entitled to his costs, having required no more than proper protection, and that he could not be compelled to part with one fund unless upon a settlement of all matters in which the Defendant acted as trustee for the Plaintiff. They also insisted that there was a special agreement to give an indemnity.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

Feb. 12.

This is a suit for 179*l.*, and it is very distressing to see how slight grounds and an idle discussion have created a long and expensive litigation. The suit is really occasioned by a demand on the part of the Defendant, and a refusal on the part of the Plaintiff to give the Defendant a personal covenant of indemnity against the consequences of the payment of the dividends on a sum of 1,346*l.*

The

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The question I must determine really is, whether the Defendant has any right, either in his character of a trustee or in respect of any special contract between the parties, to demand such a covenant or not. Now, as a trustee, he has no right whatever to any such thing. In the first place, he was not entitled to mix up the two questions (if there was a question to mix up); and, in the next place, he had actually executed the deed, and taken upon himself a trust, by which the 1,346*l.* was to be paid to the Plaintiff on the death of her mother: it is therefore very difficult for him to say that he was not bound to perform it, and pay over the money.

The next question is, whether there was any contract to give him an indemnity. I think there was not. I am, therefore, of opinion, that the Defendant has not made out any case for such a covenant, and though this Court, undoubtedly, is very desirous, in dealing with trustees, to give them, in all cases, every possible benefit, yet it cannot allow a suit to be instituted for the sole purpose of gratifying some unpleasant feelings which may have arisen in the course of an irritating correspondence, and which will have the effect of simply creating costs, and injuring the person who has a right to a fund. If it were otherwise, a trustee might in every such case extort the most extravagant terms from his *cestui que trust*, because he might say, "unless you accede to what I require you to do, I will put you to file a bill, and then, as I shall get my costs, you must ultimately be the loser."

It is necessary that the Court should protect the *cestui que trust* in this matter, and, without saying anything more than this:—that the Defendant has, in my opinion, by a great error and want of judgment, resisted this suit, that he had no right to mix up the

two

ns together, and that neither in his character
nor by reason of any contract, is he entitled
unity, I have come to the conclusion, that the
be made in favour of the Plaintiff, and that
entitled to the costs of this suit.

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Jones v. Lewis, 1 Cox, 199; *Willis v. Hiscox*, 4 Myl.
Ermin v. Pulham, 2 De G. & S. 99; *Penfold v. Bouch*,
Hampshire v. Bradley, 2 Coll. 34; *Thorby v. Yeats*, 1
C.) 438; *Campbell v. Home*, *Ibid.* 664.

BOTT v. SMITH.

Feb. 16.

1853, the Plaintiff, a civil engineer, brought
on against *Ely Smith*, as overseer, for work
e parish. The action was referred; and by
made in *May*, 1854, and the Master's *alloca-*
in *June*, 1854, *Ely Smith* was ordered to
intiff 43*l.* 12*s.* damages, and 194*l.* 16*s.* costs,
he whole 238*l.* 8*s.*

A deed may
be void as
against credi-
tors though
full considera-
tion is given
for it, if it be in
such a form as
to defeat the
creditors and
be executed
with that in-
tention.

3th of *June*, 1854, an order *nisi* for an attach-
on-payment was issued against *Ely Smith*,
served on him on the 8th of *July*, 1854, but,
of the Long Vacation, the Plaintiff was pre-
obtaining an order absolute.

In *June*,
1854, the
Plaintiff re-
covered a
judgment
against *E. S.*,
as overseer
of a parish,
for 238*l.*, and
three days
after, an order
nisi issued for
an attachment.

meanwhile, however, *Ely Smith* conveyed
away

following, *E. S.* conveyed all his estate and effects to his son, in con-
sisting lodging, maintaining and clothing him for life, and paying 75*l.* on
indemnifying him against a mortgage debt on the property, and which
bond. The full consideration was not given, but the difference was not
Court, being of opinion that the deeds were made with a view of defeat-
ing the Plaintiff's execution, set aside the transaction as against the creditors.
decree on setting aside deeds partially, viz., as against creditors only.

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away to the Defendant, his son, the whole of his property under the following circumstances. His property consisted of freehold and copyhold property, to which he was entitled in fee, the value of which, in round numbers, was about 550*l.*; but it was subject to a mortgage for 500*l.* He was also entitled to some other property for life, and the value of this interest, according to the tables, was said by an actuary to be 407*l.*, but, in consequence of his precarious state of health, it was in reality worth very little. His household goods, farming stock and chattels, were worth about 40*l.*

In July, 1854, *Ely Smith* made a proposal to his son, the Defendant *Charles Smith*, for an arrangement between them, which was ultimately acceded to, and was carried into effect by deeds dated the 21st September, 1854. On that day, *Ely Smith* conveyed to *Charles Smith* the above property to which he was entitled absolute and for life respectively, and he assigned to him all his household furniture, farming stock, and goods, chattels and effects, in and about the farm. The consideration expressed for this was the natural love and affection which *Ely Smith* had for his sons *Charles Smith* and *John Smith*, and for the purpose of obtaining a certain provision for himself during his life, and in consideration of *Charles Smith* indemnifying *Ely Smith* against the mortgage debt of 500*l.*, and also in consideration of *Charles Smith's* lodging, maintaining, supporting and clothing him, *Ely Smith*, during his life, and on his paying to *John Smith* 75*l.* after *Ely Smith's* death, and for divers other good considerations.

The Defendant *Charles Smith*, at the same time, gave his bond to *Ely Smith* to indemnify him against the mortgage of 500*l.*, to find him lodging, maintenance, &c. (

as agreed), and to pay 75*l.* to his brother *John* on
father's death.

1856.

BOTT
v.
SMITH.

On the 6th of *November*, 1854, the rule *nisi* was made
absolute, and *Ely Smith*, on the 11th, was arrested and
put into prison for non-payment of the debt and
costs. He immediately petitioned for relief under the
Debt Act, and his petition was heard in *December*,
1854, when he was remanded to prison for twelve months,
and the Plaintiff was appointed his assignee. He died
in prison in *March*, 1855.

The Plaintiff instituted this suit to set aside the con-
veyance and surrender as fraudulent against *Ely Smith's*
creditors.

The Defendant stated, that *Ely Smith's* liability to
the Plaintiff was only as representing the parish, and
he expected that the parish would pay the demand,
and that steps had been taken for that purpose, but
that it did not appear to have been effectual.

Mr. *R. Palmer* and Mr. *C. Browne*, for the Plaintiff,
stated, that the transaction was a mere fraud to defeat
the Plaintiff's remedy under his judgment. That the
conveyances were really voluntary, and the consideration in-
adequate; and that even if the full consideration had
been given, still the conveyances might be void if
made with a fraudulent intent to defeat creditors.
They cited 13 *Eliz. c. 5*; 2 *Chitty's Statutes* (a);
Me's case (b); *Cadogan v. Kennett* (c); *Stileman v.*
Down (d); *Mathews v. Feaver* (e); *Dewey v. Bayn-*
ton (f); *French v. French* (g).

Mr.

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|--------------------------------------|--|
| (a) <i>Beavan & Welsby's ed.</i> | (e) 1 <i>Cox</i> , 278. |
| (b) 3 <i>Rep.</i> 81 b. | (f) 6 <i>East</i> , 257. |
| (c) <i>Cowp.</i> 432. | (g) <i>V.-C. Stuart</i> , 21st <i>June</i> , |
| (d) 2 <i>Atk.</i> 477. | 1855, and 6 <i>De G. M. & G.</i> 95. |

1856.

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v.
SMITH.

Mr. *Lloyd* and Mr. *G. L. Russell*, *contra*. *Ely Smith* ~~th~~
 was not morally indebted to the Plaintiff, the parish ~~were~~
 the debtors, and he was justified in thinking, that ~~t~~ ~~he~~
 debt due in his official character would, as it ~~oug~~ ~~ht~~,
 have been paid out of the rates. He had no idea ~~th~~ ~~at~~
 he had any debt at the date of the conveyances, wh ~~h~~ ~~ch~~
 were executed with a *bonâ fide* intention. The ~~ca~~ ~~se~~
 comes within the exception contained in the statute, ~~t~~ ~~he~~
 deeds having been made *bonâ fide*, and upon good ~~con~~-
 sideration. The full value was paid; for the life ~~esta~~ ~~te~~
 was worthless, as the event proved, and the calculations
 of valuers and actuaries are not to be relied on; *Pot* ~~ers~~
v. Curtis (a); *Boothby v. Boothby* (b).

The deeds were not voluntary, but for value; *Marga* ~~son~~
reson v. Saxton (c); in effect they did not deprive the
 creditors of a shilling, and were not intended so to do.
 The Defendant took on himself a burthen, and not a
 benefit. They cited *Gale v. Williamson* (d); *Nunn v.*
Wilsmore (e).

Mr. *Follett* for another Defendant.

The MASTER of the ROLLS.

I am satisfied that this deed was made with the view
 of defeating the Plaintiff's execution. No doubt, it was
 a very hard case on Mr. *Ely Smith*; he was sued in
 respect of a demand with which he had nothing to do,
 except as overseer of the parish. Unfortunately, he
 being in the hands of other persons, thought he never
 should be liable for this sum of money; but an order
 being made to refer the claim to arbitration, the result

(a) *Younge*, 543.

(b) 2 *Hall & Twells*, 214, and
 1 *Mac. & G.* 604; 15 *Beav.* 212.

(c) 1 *Y. & C. (Exch.)* 525.

(d) 8 *Mec. & Wels.* 405.

(e) 8 *Term Rep.* 521.

of which was, that an award was made against him in the month of *May*, 1854, by which the sum of 43*l.* 12*s.* was found to be due, with 194*l.* 16*s.* costs. It is stated positively, that Mr. *Ely Smith* and his solicitor knew he was liable to pay the money, and were aware of the whole transaction. He made several attempts to get the parish to pay, but the overseers refused to interfere.

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BOTT  
v.  
SMITH.

In that state of the case, after he is served with a rule nisi for the attachment against him, and which could not be made absolute till Term, he, having fee simple property worth about 500*l.*, and a life estate in other property, executes a deed of conveyance in *September*, 1854, by which he conveys the whole of this property to his son upon the trusts stated. Undoubtedly I see no motive or reason for this transaction, except, that if successful, it would have prevented the Plaintiff, the execution creditor, from taking possession of the house and property, and from selling them. That they were not worth a great deal is very probable; but it appears to me, on the evidence, that the fee simple property was certainly worth as much as the mortgage, and probably a little more. And there was, besides, the life interest in the two remaining properties. With respect to the value of the whole property, there is a variation of testimony; one says it is worth 92*l.* a year, and I think the other makes it 75*l.* a year. It is said, that his life interest was worth nothing; it is impossible for me to come to that conclusion. I have no doubt he was in a very infirm state of health, and that the valuation made by Mr. *Morgan*, the actuary, on the assumption of his being a good or ordinary life, is not an accurate valuation. I have no doubt, also, that in the state in which he then was, his being put in gaol and kept there materially affected his health, and probably accelerated his death, which took place four months after his imprisonment.

I cannot

# CASES IN CHANCERY.

1856.

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v.  
SMITH.

I cannot say, in that state of circumstances, that a full consideration was given for this property, though, from his father's early death, the result may be, that the son may have paid more for this property than he has obtained for it. I observe also, that Mr. Franklin did not hesitate afterwards to advance 100*l.* on mortgage on this property, which was already subject to a prior mortgage of 500*l.* All parties were perfectly well aware of this execution for upwards of 200*l.* against the Plaintiff, that steps had been taken to enforce it against him, and that the result would have been to have turned him out of possession of the property; and in fact, this was the only means by which he could be retained in possession of it. In that state of circumstances, it seems to me that the inference is irresistible, that this deed was executed with the view of delaying and defeating the creditor. I do not use the expression "fraudulent," it is not the proper expression with respect to this case. As between the father and son, I have no doubt, that if the parish had paid the debt, this would have been treated as a perfectly binding transaction between them; but, at the same time, I have no doubt, that the moving consideration which induced the father to enter into this arrangement, at this particular time, was the fact, that this execution was about to issue against him.

I am not disposed, in that state of circumstances, to send this case for the opinion of a jury, and to have it tried over again. It is desirable to send a case to a jury, where there is a matter of very great doubt depending on the testimony of some particular witnesses; though now that the Court has itself the means of seeing the demeanor of the witnesses, it is less necessary than formerly. But here I draw my conclusion from the dates and facts, which are not susceptible

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any alteration by the testimony or demeanor of the witnesses, and they bring me to the conclusion that this deed was executed with a view or for the purpose of defeating or delaying the execution of the Plaintiff.

1856.

BOTT  
v.  
SMITH.

It is said, that when this transaction is set aside, the Plaintiff will get very little by it. But if I am of opinion, that it is void under the statute, I am bound to come to that conclusion. Even if full consideration had been given, that is not sufficient, because, as is shewn in the case in *Atkyns(a)*, the consideration may be given in such a form as to defeat the judgment creditor; and this is a case in which it might defeat the judgment creditor. If the full consideration, given for this conveyance, was a sum to be paid to the younger brother and the maintenance of the father during his life, it is obvious that it would defeat the judgment creditor, who would obtain nothing under it, though there was a full consideration.

I am of opinion, therefore, that I must declare this deed to be void; that is to say, under the statute. The deeds will not be cancelled, but the Defendant must concur in raising the amount due to the creditors.

(a) *Stileman v. Ashdown*, 2 *Atk.* 477.

ABSTRACT OF ORDER:—

Declare, that the Indentures are void as against the Plaintiff and all other the creditors of *Ely Smith*; and order the Defendants to join in and concur in all necessary acts, conveyances, &c., for the purpose of raising the amount due to the Plaintiff and all the other creditors, out of the estates, and the rents; direct an account to be taken of the rents. The Defendant to pay the costs.

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NOTE.—Affirmed by the Lords Justices, 9 June, 1856.

1856.

## HILLERSDON v. GROVE.

Feb. 18.

A testatrix, by her will, gave to A., B. and C. distinct legacies, and she appointed A. and B. executors, and gave "to her executors, A. and B.," her residuary estate. By a codicil she appointed C. executor and trustee of her will, "as if his name had been inserted therein as a trustee and executor," and a legacy for his trouble, "in addition to the benefit he derived under her will," and she declared, that her trust estate should vest in A., B. and C., and confirmed her will in all other respects. C. claimed one-third of the residue, but the Court held that it was divisible between A. and B.

THE testatrix, amongst other legacies, gave *Joseph Grove* a legacy of 425*l.*, *Charles H. Grove* a legacy of 1,275*l.*, and *Frederick E. Hillersdon* (the Plaintiff) a legacy of 425*l.*, all payable six months after her decease. She appointed *Joseph Grove* and *Charles H. Grove* executors of her will. She then proceeded to express herself as follows :—"And as to all the residue of my property, &c., I devise and bequeath the same to my executors, my brother *Joseph Grove* and my nephew *Charles H. Grove*."

By a codicil, she declared, "that *Frederick E. Hillersdon* should be also executor and trustee, jointly with *Joseph Grove* and *Charles H. Grove*, and that her said will should take effect in the same manner, as if the name of *Frederick Edward Hillersdon* had originally been inserted therein as a third trustee and executor. And she requested *Frederick Edward Hillersdon* to accept a legacy of 50*l.* as some slight acknowledgment for the trouble he would have in the execution of the trust; and she thus lay upon him, such legacy to be independent of and in addition to the benefit he derived under her will; and she declared, that her trust estate and property should vest in *Frederick E. Hillersdon*, jointly with *Joseph Grove* and *Charles Houbton Grove*. And she confirmed her will in all other respects.

The three executors having proved the will and codicil, the Plaintiff, *Hillersdon*, now claimed, as executor and under the terms of the codicil, to be entitled to one-third of the residue.

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Mr. *R. Palmer* and Mr. *Waller* for the Plaintiff.

1856.

Mr. *Toller* and Mr. *Greene* for the Defendants.

HILLERSDON  
v.  
GROVE.

*The MASTER of the ROLLS* held that the residue was to be divided amongst the Defendants to the exclusion of the Plaintiff.

BROCAS v. LLOYD.

MR. *HORSEY* moved for the appointment of a special Examiner, to examine witnesses at *Clifton* and *Hereford*, on the ground that they could not conveniently come to town, and that an appointment from the Examiners of the Court could not be obtained (a).

Feb. 19, 26.  
Disinclination of the Court to appoint special Examiners, on account of the great expense it entails on the suitor.  
*The Master of the Rolls* will not appoint one except in cases of absolute necessity.

Mr. *R. Palmer* and Mr. *Eddis* submitted to any order.

*The MASTER of the ROLLS.*

The expenses of a special examiner are so serious, and the parties are so little aware of it, that I am determined not to grant a special Examiner except in cases of absolute necessity. I must interfere for the protection of the suitors, who are not aware of the enormous expenses which the proceeding entails on them. Let the costs be costs in the cause.

Mr. *Horsey* renewed his application. He relied on *Reed v. Prest* (b), in which the Vice-Chancellor *Wood* held, "that the former practice was not altered in the

Feb. 26.

case

(a) See 15 & 16 Vict. c. 86, ss. 31, 35. (b) *Kay, App.* xiv.



1856.

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 BROCAS  
 v.  
 LLOYD.

case of witnesses who resided more than twenty miles from London," He argued that the Court would not compel a witness living so far away to come to London, but must send a commissioner.

*The MASTER of the ROLLS.*

I am not of that opinion. This is getting back to the old practice of commissions, and if the system is to continue special Examiners must be appointed in the country. I object to the appointment of special Examiners, both because the evidence is generally not so well taken, and because the expenses are quite alarming. Clients know nothing of the matter until they get their bill. I will make inquiry of the Examiners as to the state of business in their offices.

No order was made (a).

Feb. 19.

## RE PEERS.

Upon a taxation under the statute, assignees of a bankrupt solicitor are personally liable for the costs of taxation of a bill of costs delivered by them, where more than one-sixth is taken off.

A SOLICITOR having become bankrupt, an order was made, on the application of the client, that the assignees should deliver his bill of costs, and that it should be referred for taxation, and if less than a sixth should be taken off, the Master was to tax the client's costs, and conversely. The Master was to certify the amount due from the client to the estate of the bankrupt, or from the estate of the bankrupt to the client, as the case might be, having regard to the costs of the reference, &c. The amount due from the client was ordered to be paid, but nothing was said as to payment of what might be found due to the client.

More

(a) See post.

More than one-sixth was taken off the bill, and, on taking the cash account, 966*l.* were, on the whole, found due from the solicitor to his client. The costs of the reference were taxed at 27*l.* 18*s.* 6*d.*

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Mr. *R. Palmer* and Mr. *Bernard* moved, that the bankrupt and his assignees might pay the costs of the taxation. They contended that the assignees were, under the statute, personally liable for these costs. The 6 & 7 Vict. c. 73, s. 37 (they said), authorizes the Court, upon the application of the party chargeable, "to refer such bill, and the demand of such attorney or solicitor, administrator or *assignee*," for taxation; "and if such bill, when taxed, be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator or *assignee* of such attorney or solicitor shall pay such costs."

Mr. *Lloyd* and Mr. *Amphlett*, *contrà*.

The MASTER of the ROLLS was disposed to think that the original order was defective in not ordering payment of the costs in question by the assignees. He ultimately ordered the assignees to pay the costs of the taxation, and gave liberty to the client to go in under the bankruptcy, and prove for the amount found due.

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NOTE.—The general form of order in the Secretary's office has been since altered, and now, in case the Master shall certify that any amount is due from the bankrupt's estate, and the bill, when taxed, shall be less, by a sixth part, than the bill as delivered, "IT IS ORDERED, that the assignees do pay to the Petitioner the amount which the Master shall certify to be due for the costs of the reference."

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Feb. 27, 29.

## KAY v. SMITH.

An infant, on coming of age, may ratify securities given by him during his minority, without receiving any further consideration, but he must, on the occasion, have full knowledge and complete information respecting the transaction.

The Plaintiff had, during his minority, accepted bills to a considerable amount, which he handed to A., who raised money on them from B. and C., in whose hands the bills had remained. Immediately on coming of age, the Plaintiff, in the belief, brought about by the misrepresentations of A., B. and C., that the bills were in circulation, and that they had bought

IN March, 1852, the Plaintiff, Mr. Kay, who was but nineteen years of age, and entitled, under his father's will, to a life interest in property producing nearly 10,000*l.* a year, became acquainted with Mr. Johnston, who was considerably older. They resided together, and had joint establishments in *Paris*, *London* and at *Feltham*, and seemed to have lived together in a course of reckless extravagance. To meet the expenses, the Plaintiff, during his minority, accepted bills to a very considerable amount, and handed them over to Johnston, who raised money on them, through his intimate friends Mr. Adams and Mr. George Smith, on the assurance of Johnston, that Kay, when he came of age, would not contest their validity, and would give good security for the amount.

Prior to the Plaintiff's attaining twenty-one (which occurred on the 11th of April, 1854), Johnston, Adams and Smith appeared to have been under some anxiety as to obtaining payment, and made arrangements for their security. Johnston represented to the Plaintiff that bills to the amount of 60,000*l.* were in circulation, in the hands of several persons, and that it would be greatly to the interest of the Plaintiff, that they should be all got in and taken up by one or two persons.

The Plaintiff, at the instigation of Johnston, applied to

them up for the purpose, gave to B. and C. securities for the amount of the bills in their hands. The securities were set aside unconditionally, on the ground of the misrepresentation and the want of due information.

to *Adams* to get up the bills, which he consented to do, and on the following day (the 1st of *April*, 1854), the Plaintiff wrote to *Adams* as follows:—

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“Mr. *Johnston* will send you by this post a list of the bills which you were kind enough to say yesterday you would take up, and which, I trust, you will be able to do with as little delay as possible, so as to prevent their being presented for payment at my bankers. Though I am still under age, Mr. *Johnston's* name is to all the bills as drawn, and therefore it is not as if you were doing it solely for a minor, besides, as I will be of age in a few days, I can then, on your giving up the bills, give you any security you may desire to hold, until such time as my affairs are settled, and I can pay it off.

“The whole of the bills amount to 53,800*l.*, 32,000*l.* were discounted by a Mr. *Arnold*, and they are now, I believe, in the hands of some of his clients, as well as one for 5,500*l.* The rest have all been discounted by Mr. *Thomas Cox*, of *Ware*, and I believe are now in his hands, but Mr. *Johnston* will, perhaps, be able to give you more particular information than I can.”

On the 4th of *April*, 1854, *Johnston* wrote to *Adams* as follows:—“I enclose the drafts of the two letters as agreed, and which it would be well to write at once and post. You will, I think, approve highly of both of them, you may expect to hear from us, in reply to our letters, almost by return of post.”

One of these letters was to be sent by *Adams* from *Ware* to *Kay*, and was in these terms:—“I am happy to inform you, that, acting upon the instructions contained in your letters of the 1st *April*, I have succeeded in taking up all your bills discounted by Mr. *Cox* of this town.

Those

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Those discounted by Mr. *Arnold* my clerk tells me he has had more difficulty with, inasmuch as they were in the hands of different individuals, and he had much difficulty, notwithstanding the information received from Mr. *Johnston*, in tracing them. He has succeeded, however, in taking up most, and expects to take up the remainder in the course of to-day or to-morrow. Any day that may be agreeable to yourself and Mr. *Johnston*, I will be happy to meet you to hand over the bills and obtain your execution to a security in my favour." This letter went on to state, that the amount being large, and the money market depressed, he (*Adams*) wished "to obtain a friend" to join him in making the advance.

The second draft letter was to be sent by *Adams* to *Johnston*, and was in these terms:—"My dear *Johnston*, In a letter I have just written to your friend Mr. *Kay*, I have told him of our having taken up a considerable portion of his bills, and the probability of my clerk being enabled to get up the others in a day or so. I shall be glad to hear from him and you, naming an early day when I can attend you to hand them over and obtain your joint execution to a security which I am having prepared."

"I propose, if it suits your views and his, to get my friend Mr. *George Smith* to advance a portion of the funds required, and should your friend not have made arrangements for a lawyer to act for him on his behalf, I should have much pleasure in suggesting him to manage his affairs. As he has been personally acquainted with you for some years, you have had ample time to judge of his integrity and ability, and will, I know, join me in wishing your friend to possess himself of such a man as Mr. *George Smith* as his confidential adviser."

The

The statements in these draft letters were characterized by the Court as being "a tissue of falsehoods;" the fact being, that the bills were in the hands of *Adams*, of *Johnston*, or his agent (*Arnold*), and of *Smith*, and were not, as represented, in circulation.

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*Adams* hesitated sending copies of these two letters as directed by *Johnston*, but a subsequent letter was written by him to the Plaintiff on the 7th of *April*, 1854, which was as follows:—"My dear Sir. I am glad to say I have succeeded in taking up most all the bills, and have no doubt I shall be able to get them all in by to-morrow, having ascertained where they are. Some of them not being quite due, has been so far in my favour, in arranging the payment of them."

*Smith* was at this time a stranger to the Plaintiff, but he was party to this misrepresentation. He had previously acted as the solicitor of *Johnston*, and been engaged with him in these matters, and before this arrangement with *Adams* for getting up the bills, he had been preparing deeds for the Plaintiff's execution, for his own and *Adams*' security. That he, *Smith*, was privy to the suggestion made by *Johnston* to *Adams*, to write the two letters of which he sent copies, was shewn by a letter of *Smith* to *Adams*, dated the 5th of *April*, 1854, as follows:—"Once more let me impress on you the importance of writing the letters to Mr. *Johnston*, and have them posted early to-morrow morning, and such letters should not vary from those suggested by Mr. *Johnston*, or depend upon it you will jeopardize both of us. The bills held by Mr. *Johnston* will be handed over to you, which will be included in your bond and assignment of six policies for 5,000*l*. You have handed me two policies, *Johnston* one, the Pelican policy I shall receive to-morrow, you must therefore have two policies.

However,

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However, let me have the particulars of what you can find, as also your bills, dates, when payable, and amounts, without which I cannot complete the bond to be executed to you by Mr. *Johnston* and his friend. Your hand will receive the amount of your own bills, and *Johnston's*, out of which *Johnston* will give you authority to pay 5,000*l.* to the English and Scottish Law. Let me have the particulars I require *per* very return."

A meeting was held on the 12th of *April*, 1854, at which *Johnston*, *Adams*, *Smith* and the Plaintiff were present, and the Plaintiff executed a bond to *Smith* for securing 12,594*l.*, and securities to *Adams* for 41,256*l.*, which had been prepared by *Smith*.

The Plaintiff alleged, that he had executed the securities in the belief of the representation that *Adams* had taken up and got in the bills, and had afterwards handed some of them to *Smith*. He stated, by his bill, that he was willing to pay the amount (if anything) which the Defendant paid for taking up or getting in the bills to third persons, or to *Adams*, under the circumstances aforesaid, although they were accepted by the Plaintiff during his infancy. The Plaintiff also submitted, that the Defendant was entitled only to require from the Plaintiff payment of the sum actually paid by him to third persons, or to *Adams*, for taking up or getting in the bills together, and that such securities should stand as a security only for the sum so actually paid by the Defendant.

The bill prayed a declaration that the bond ought to stand as a security for such principal sum only (if any as the Defendant actually paid either to *Adams* or to third persons for taking up or getting in the several bills.

**bills of exchange, and for an account on that footing, and for an injunction against proceedings at law.**

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**Mr. R. Palmer** and **Mr. Dickinson**, for the Plaintiff, asked the Court to set aside the security *simpliciter*, without imposing any terms. The Plaintiff, they said, was ready to abide by his letter, and pay all those bills which had been got in under it, but the bills in *Smith's* possession had been obtained by him, not under that letter, but by a previous dealing with his friend *Johnston*, and on his sole security, and not on that of the Plaintiff, whom *Smith* first saw on the day he came of age. They said that the object of *Smith* was to make *Kay* pay *Johnston's* debt. They argued that there had been both misrepresentation and concealment as to the real facts of the case, and that *Smith* had been a party to the plot to induce the Plaintiff to give security for bills represented to be in circulation and in the hands of strangers. They argued, that either *Smith* acted as the Plaintiff's solicitor, and stood in a fiduciary relation towards him, and that, if not, then that the Plaintiff had no professional assistance on the occasion.

The *Solicitor-General* (Sir *R. Bethell*) and *Mr. Speed* for the Defendant, did not dispute that the securities must be partially set aside, but they insisted that they should stand as a security for what was justly due to *Smith*, and for the amount of all the bills which *Smith* had *bonâ fide* discounted. They relied on the transaction of the 12th of *April*, 1854, as evidence of an acknowledgment of the Plaintiff of his liability in respect of the bills accepted during his infancy. They argued that the mere ratification in writing, by an infant, on attaining twenty-one, of bills accepted by him during his infancy, was sufficient to render them valid. That the Plaintiff was bound by his offers to pay, and was



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bound by the statement made by him on oath upon his cross-examination in this cause, that "he had always been willing and was willing to pay any claims which might be proved against him—any sum of money which had been forwarded to him or paid on his account." They urged also, that if every fact as regarded *Smith* had been stated to the Plaintiff at the time, he would equally have given him the security, and that the relation of solicitor and client did not subsist between the Plaintiff and the Defendant when the securities were given; *Small v. Currie* (a).

*The MASTER of the ROLLS* said, that before hearing a reply he would look over the papers.

Feb. 29.

*The MASTER of the ROLLS.*

This suit is instituted for the purpose of setting aside a bond, given by the Plaintiff the day after he had attained his age of twenty-one years, for the sum of 12,000*l.*, and an assignment of certain securities. The Plaintiff contends, that he is entitled to have them simply set aside without any condition. The Defendant submits to have these securities set aside; he does not insist on their standing as securities for the whole amount, or for interest at  $7\frac{1}{2}$  per cent.; but he contends that he is entitled to have them sustained as a security for the sums of money *bonâ fide* advanced by him to *Johnston*, on certain bills given by him and accepted by the Plaintiff during his infancy. The way in which he puts his case is this: he says, that during the infancy of the Plaintiff Mr. Kay accepted bills for Mr. *Johnston*; that Mr. Kay asked Mr. *Johnston* to get money for him on those bills, and assured him, that

(a) 2 *Drewry*, 102.

when he came of age, he would never question or contest the propriety of their payment, and would give good security for their payment; and that, accordingly, *Johnston* obtained money on those bills, upon that assurance. That the Plaintiff, when he was about coming of age, was very desirous that the bills should all be got together and returned, and to pay the full amount or give security for them, is I think shewn: and in that state of circumstances, if the Defendant *Smith* had said simply to Mr. *Kay*, at the time when this transaction took place, "it is true, I am not the holder by indorsement of these bills, but I am the *bonâ fide* discounter of these bills, and I gave money for them to *Johnston*, upon his assurance that you would pay for them when you come of age," I think it is highly probable that Mr. *Kay* would not have hesitated, but have said, "Well, in that state of circumstances, you are entitled to these bills, and I will give you a security for that amount."

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It is contended by the Defendant, that although this was not exactly what took place at the time, it was, in point of fact, very much the same thing, as far as the Plaintiff is concerned; for in the case supposed, he would have intended to pay for the whole of these bills, and that now he would only have to pay for them the money which was *bonâ fide* advanced upon them. It is undoubtedly true, also, that when an infant comes of age, and, knowing what he is about, consents to be bound by any securities given by him during his infancy, a legal and a binding obligation is created on him, both at law and in equity, to pay those securities; and, that it does not require any fresh consideration to make the bills or other securities, which he has given during his infancy, valid, if he ratifies them after he attains twenty-one, with full knowledge and complete information re-

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specting the transaction. All this, as far as it goes, is in favour of the Defendant *Smith*; but to render the transaction valid, it is essential that the infant, attaining twenty-one, should be fully informed of every thing relating to the matter; that he should not be kept in the dark with respect to any part of the transaction; that he should be fully informed of what he is about and that he should do everything that he intends with his eyes open, and with a perfect knowledge of the whole transaction.

Now what was the nature of the transaction? It really was this—In the first place, Mr. *Adams*, Mr. *Smith* and Mr. *Johnston* were all three intimate friends. They are constantly writing respecting the Plaintiff *Kay*, and, during the last years of his infancy, they had supplied *Johnston* with very large sums of money, and some of it to *Kay* himself, for the purpose of enabling him to carry on a system of the most extravagant expenditure that can well be conceived for any young man of his age, and with his prospects and expectations. They expected, and *Johnston* firmly believed and assured them, that when the Plaintiff came of age he, by means of his influence over him, would get him to make himself liable for all the monies so advanced. In order to effect this end, it appears from the correspondence, that *Johnston* thought this a matter of considerable delicacy and great nicety. He considers there was considerable risk in the transaction—risk no doubt of Mr. *Kay* getting away, and, for the purpose of accomplishing this end, he considered this expedient to be essential:—that it should be believed by Mr. *Kay* that these bills had been duly discounted by various persons, and were in the hands of various holders running about the money market; and that then, by the employment of some gentleman, such as Mr. *Adams*, and by means of funds which

which he had at his disposal, he could go to the various holders of these bills and buy them all up, and, being so bought up, the Plaintiff undertook to secure him the money which had been expended for the purpose of returning all the bills. The facts were, that the larger portion of the bills were in the hands of *Arnold*, who was nothing more himself than a mere agent of Mr. *Johnston*, and had never been in the money market at all. With respect to Mr. *Smith*, it appears, that the bills discounted by him had been retained by him, and had never been in the money market at all. That this was the real transaction between them, and that they considered it necessary to keep these matters perfectly secret from Mr. *Kay* appears evident from the letters. [*His Honor read the letter of the 4th of April*, "I enclose," &c. *see ante*, p. 523.] *Johnston* is there saying, it is very essential, in order to keep up this delusion with respect to the Plaintiff towards "us," that you should write such letters as may retain him in that delusion, for that is how I interpret the meaning of it: you cannot understand the effect upon his mind so well as we can, and, therefore, we suggest to you the species of letter which it is proper and desirable you should write, that is to Mr. *Johnston*. It is true, that in this letter the expression "us" is ambiguous; but from a letter which I am about to mention I have no doubt it must mean Mr. *Johnston* and Mr. *Smith*. I cannot help saying, that the letter has been correctly described by Mr. *R. Palmer*, when he said, "it contained a tissue of falsehoods." [*His Honor here commented on the several paragraphs of the letter, and shewed their untruth.*] The passage in this letter as to the friend who was to join him in making the advance was obscure; but it was intended to make that a little more clear, by a letter to be written at the same time by Mr. *Adams* to Mr. *Johnston*, in which he introduces Mr. *Smith's* name expressly.

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expressly. He says, "My dear *Johnston*"—[*His Honor read the letter, see ante, p. 524.*] The evidence convinces me, that that letter was written by the desire and with the privity of Mr. *Smith*; and that those two letters were to be written by Mr. *Adams* for the purpose of being shewn to the Plaintiff. The proof that is contained in the letter of *Smith* himself, written on the 5th of *April*, to Mr. *Adams*. [*His Honor recited, ante, p. 525.*] It is obvious from that letter, that Mr. *Smith* knew the contents of the draft letters which were sent by *Johnston* to Mr. *Adams*; and that he was a party to that particular transaction, which he considered necessary, for the purpose of keeping the Plaintiff in that species of delusion, which they considered essential, for the purpose of inducing him to recognize his liability to the bills which he had accepted during his minority.

It is obvious, not only that *Smith* was preparing all these securities at the time, but it is the common case of both, that up to this time the Defendant *Smith* had never seen the Plaintiff, and had had no communication with him at all. Is it possible, in that state of circumstances, to say, that he was not a party to that species of delusion in which it was considered essential to keep the mind of the Plaintiff involved, for the purpose of inducing him to come to the arrangement which was proposed on the 12th of *April*, 1854, the day after he came of age?

Mr. *Adams*, it appears, could not be induced to write those letters, but he does the essential part of it, which was to make the Plaintiff believe, that these bills were in circulation everywhere, and that they were to be bought up and got in for the purpose of being paid; and, accordingly, after a delay of two days, Mr. *Adams*,

on

Mr. Adams writes a short letter, in which he says, "I have succeeded in taking up the bills, and I have no doubt I shall be able to do so, having ascertained where they are quite due, and have been making payment of them."

Mr. Adams told his friend, nor did he have Mr. Adams sustains the bills.

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Mr. Adams together on the presentation of Mr. Adams of Mr. Smith, the bills had been regularly paid in the ordinary course of business. Mr. Adams had got them up for him, and Mr. Smith to take a portion of them, and then the bills which had been got for an amount something like 42,000*l.*, which was to be secured. Upon that, Mr. Adams recites, expressly, that Mr. Adams is not the discounteer but the holder by virtue of these bills. That is the form of the bill.

if a young man intends to pay bills, what whether he intends to pay them to the holder of the bills or to the holders by indorsement? as I have already stated, that it is essential that he should be informed of all the facts of the case, and that the parties evidently believed, that if he was not informed of the facts of the case, he could not be said to have taken these securities; that it was essential to believe that these bills had been duly negotiated in the ordinary manner, but that if

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if he had been informed that the greater part of these bills had never been out of the power of *Johnston*, and that the remainder had never been out of the power of *Smith* or *Adams*, he would thereupon have refused to enter into this transaction. What the event would have been, it is impossible for me to tell; but it is impossible, that *Smith*, who joined expressly in creating and in keeping up this delusion, which was considered essential for the purpose of inducing this young man to enter into securities, which can only be binding upon him with a true knowledge of the facts, to say, that if he had told the truth the result would have been the same; he cannot now contend, that if he had said to *Kay*, "I am the discounter, to the extent of 10,000*l.*, of the bills for value and upon the faith of your name being to them, and that you would not allow me to suffer from trusting to your honour;" and that Mr. *Kay* would have adopted that view, would have acceded to that suggestion, and would not have said what he now says, viz., "You are not entitled to have security for the money which you have actually advanced upon those bills." *Smith*, I say, is not in a position to make that case, and he has put his issue upon a totally different footing.

The materiality of the distinction is, that the truth was not told the Plaintiff, and that it was believed by the Defendants, that the truth would be fatal to them, and that it was essential to create the delusion in which all those three persons have concurred and combined, for the purpose of obtaining these securities.

Then it is argued, that Mr. *Kay* says, "I am willing to pay everything which has been advanced for my benefit or for my use." Mr. *Smith* says, "Well, this was paid to *Johnston*, and that was paid for the use and benefit of the

intiff." Upon that part of the case, the evidence is me, that it was not paid to the Plaintiff, or for benefit or the use of the Plaintiff. It was paid for benefit and for the use of *Johnston*, and upon the of *Johnston*, strengthened, no doubt, by the as- which *Johnston* gave, and which was true, that tended to make good all the bills which he had or the purpose of raising money for his benefit. ere is this distinction:—I nowhere find, that the ff said, that he was prepared to make good all s given by him to raise money for the exclusive of Mr. *Johnston*; but this money was not paid Plaintiff, nor is there any trace whatever, that ney was applied for the benefit of the Plaintiff. ighly probable, that a large portion of it was so l, and, I believe, that a large portion of it was so l. If any portion of it was so applied, it was e mere will and pleasure of Mr. *Johnston*. Mr. took no pains for that purpose; he did not require e money should be paid to *Kay*; he did not re- hat *Kay* should know that he had advanced so of the money for his benefit and for that of Mr. on, but he advanced it to *Johnston* to do what he l with it. It is probable, however, that *Smith* from the system that was carried on between wo persons, that a very large portion of it would oloyed for the purpose of keeping up that reckless of expenditure, and that supply of money, which e cause of the influence retained by Mr. *Johnston* e mind of Mr. *Kay*.

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of opinion that these securities must be simply le, and no condition made with regard to them.

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Feb. 18, 22.

A. and B. were joint owners of a house, and A. had laid out on it monies he had obtained from B. Held, that B. had no lien on the house for the amount.

Observations as to the duty of guardians to watch over their wards.

## KAY v. JOHNSTON.

THIS suit arose out of the transactions stated in *Kay v. Smith* (a), and sought an account against Mr. Johnston, and to establish the Plaintiff's right to moiety of the three joint establishments. The Plaintiff also claimed a lien on the share of Johnston of those properties, for so much of the purchase-money as had been paid out of the produce of the Plaintiff's bills.

Mr. R. Palmer, Mr. Cairns and Mr. Dickinson for the Plaintiff.

Mr. Renshaw for Johnston.

Mr. Roupell and Mr. Grove for the trustees of Johnston's settlement.

Mr. Giffard for Mr. Adams.

Mr. Palmer in reply.

Feb. 22.

*The MASTER of the ROLLS.*

Upon the fullest consideration that I have been able to give to the question, I am of opinion that the Plaintiff is not entitled to any lien on the share of Johnston in respect of money which was originally his, but was advanced

(a) *Ante*, p. 522.

advanced to *Johnston* and laid out by him in the decorations and improvements of the house in *Hill Street, Berkeley Square*. It is admitted that there was no contract to this effect, and, in my opinion, none takes effect by operation of law. It was assimilated to the case of a partnership, and it was suggested that, in the case of a partnership, the joint property would, in the first place, be liable to repay the advances of the various partners before any division of the capital was made between them. That would be so; but, in my opinion, this was not a partnership, and cannot properly be treated as analogous to one. A partnership, no doubt, may exist in land, as in the case of *Dale v. Hamilton* (a), but a partnership means this:—that the joint property shall be employed for some purposes which shall produce a return in the shape of profits, or so as to add to its value; but nothing of that sort took place here. It was, in fact, nothing more than a joint occupation, under a joint ownership of the property, and, in that point of view, the source from which any money laid out by either party was obtained is immaterial, and does not give the person from whom the money is derived any lien. The Plaintiff, therefore, is not entitled to any lien on the property.

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I cannot conclude this case without expressing the deep feeling of pain which I feel at the conduct of the guardians in the present case. Here is a young man, a ward of Court, possessed of a very large fortune, for he had a life interest in real estate of 6,000*l.* a year, and he had the interest of about 120,000*l.*, producing together something like 10,000*l.* a year. The guardians seek, and obtain for him, an allowance of 1,300*l.* a year, which was not an undue allowance, having regard to the

(a) 2 *Phill.* 266.

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the extent of his fortune, if he had been kept under proper control. But during the last two years of his minority, as far as I can make out, he seems to have had complete power to go where he liked and to do whatever he pleased, no species of control of any sort was exercised over him, and in all these proceedings at *Paris* there does not appear to me to be any trace of intervention, or even of advice. It is obviously impossible for this Court, with the number of wards which it has under its care, to be aware of their conduct, but it does what it can, and requires the guardians, from time to time, to give general information of what is taking place. But there are wards possessed of large fortunes, and of very extravagant habits, who get into difficulties during their infancy. In those cases the guardians apply to the Court in chambers to afford such assistance to the ward as may extricate him from his difficulties and put him in a better course of conduct. This Court has always interfered, and I have had many instances of that kind in Chambers, in which the interposition of this Court has been usefully exercised. But here the guardians seem to me to have allowed the Plaintiff, evidently a very weak young man, to go abroad without the slightest control, without even the knowledge of this Court, which it would never have permitted except under due and proper control, without, I will not say a tutor or a protector, but without even a companion of any sort whatever, and allowing him, a weak young man, with large expectations and a large allowance, to associate with whomsoever he pleased. What they could have expected it is difficult to understand. The result has, unfortunately, been that which persons experienced in the world might reasonably have expected.

I cannot but make some observations upon the subject,

ject, because it is the duty of this Court to remind all persons who undertake the guardianship of an infant, whether a ward of this Court or not, that it is their duty to perform their trust, that they undertake an obligation, and that if they are incompetent or unwilling to perform it, it is their duty to relinquish it to other persons who can attend to it, and see that proper attention is given to, and control exercised over the ward committed to their care. Unfortunately, the result has been, that this young man, with a fortune of about 10,000*l.* a year, finds himself, even under the most favourable result of this case, with a mortgage of 30,000*l.* on his life interest, and an obligation to keep up an assurance upon his life to secure it. All that this Court can do at present is, to prevent, as far as possible, the persons who have enveloped him in their toils from retaining the benefits derived from their machinations.

1856.  
~  
KAY  
v.  
JOHNSTON.

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On a subsequent day,

*The MASTER of the ROLLS* stated, that the guardians had furnished him with explanations shewing the steps they had taken, and the endeavours they had made, to stop the course of life which the infant was pursuing.

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1856.

COLLEN *v.* GARDNER.

Feb. 26, 29.

A steward has no general authority to enter into contracts for granting leases of farms for a term of years; and therefore, where a steward and land agent, whose powers were specially limited, had, in the name of the owner, entered into a written agreement with a farmer, to grant him a lease for twelve years, but without communicating to him the fact that his power was specially limited: it was held, that the agreement did not bind the owner.

Where a general authority is given to an agent, this implies a right to do all subordinate acts incident to, and necessary for, the execution of that authority, and if notice be not given that the authority is specially limited, the principal is bound.

**MR. WRIGHT** was the land agent of the Defendant Mr. *Gardner*, and had for some years managed his property and received the rents, but the Court, on the evidence, came to the conclusion, that he had no express authority to enter into contracts, on behalf of the Defendant, for granting leases. A farm belonging to the Defendant having been vacant, the Defendant directed Mr. *Wright* "to find a tenant as soon as possible."

The Plaintiff negotiated with *Wright* for a lease of the farm, and, on the 21st of *April*, 1853, a preliminary agreement was signed by the Plaintiff and *Wright*, as the agent of the Defendant, for letting the farm to the Plaintiff for twelve and a half years, at a certain rent and on specified terms. On the next day *Wright* wrote to the Defendant, "I agreed to let the farm" to *Collen*; but in this letter *Wright* said nothing as to the term of years. On the 25th, the Defendant wrote to *Wright*, "Of course you will consult with me previous to the term of lease to be allowed to *Collen*."

Notwithstanding this, on the 31st of *May*, 1853, *Wright* entered into a formal agreement for letting the farm to the Plaintiff for twelve and a half years. This was signed by the Plaintiff and by the Defendant, described as "agent to *W. D. Gardner, Esq., lessor*."

This

This did not come to the knowledge of the Defendant until some months afterwards, and when pressed to grant the lease he positively refused, and this bill was filed for a specific performance.

1856.

COLLEN  
v.  
GARDNER.

Mr. *R. Palmer* and Mr. *Wickens* for the Plaintiff. First, *Wright*, as general agent for the management of the Defendant's estate, had a general authority to enter into a contract for letting the farms. Secondly, there was, in this case, a special authority given to him by the Defendant for that purpose. Thirdly, there has been a subsequent ratification of the contract by the Defendant himself. The Duke of *Beaufort v. Neeld* (a); *Ridgway v. Wharton* (b), were referred to (c).

Mr. *Roupell* and Mr. *Cole*, *contra*, were not called on.

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*The MASTER of the ROLLS.*

Feb. 29.

I am of opinion that this bill cannot be sustained. The question really is this:—whether Mr. *Wright* had either an express authority to conclude an agreement for a lease of the Defendant's property to a tenant without the sanction of the landlord; or whether such a power was included in his general authority as a steward.

First, had he an express authority for that purpose? I am of opinion that he had not. The two letters shew me, that it was considered, on both sides, that the landlord was to be consulted respecting the letting of this farm,

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|----------------------------------------|-----------------------------------------------|
| (a) 12 Cl. & Fin. 248.                 | <i>Sainsbury v. Jones</i> , 2 Beav. 462,      |
| (b) 3 De G., M. & G. 677.              | and 5 Myl. & Cr. 1; <i>De Bouchout</i>        |
| (c) See <i>Peers v. Sneyd</i> , 17     | <i>v. Goldsmid</i> , 5 Ves. 213; <i>Paley</i> |
| Beav. 151; <i>Helsham v. Langley</i> , | <i>on Principal and Agent</i> , 189 (3rd      |
| 1 <i>Younge &amp; C. (C. C.)</i> 175;  | ed.).                                         |

1856.  
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 GARDNER.

farm, and that no express authority was given to the steward to conclude an agreement for this purpose without consulting the Defendant. No doubt, if a person who takes on himself to act as the agent of another and as such enters into an agreement, and communicates what he has done to the principal, and the act afterwards adopted by him, it then becomes the agreement of the principal. The person is then *ex post facto* constituted an agent, that is to say, the principal has adopted and ratified the act.

But what the Defendant does in this case is this: he says, "Of course you will consult with me previous to the term of lease to be allowed to *Collen*," that is, before you determine on any term of years let me know, and consult with me on the subject. I am of opinion that the Defendant has not bound himself by any acquiescence in the transaction.

The next question is this, does the fact of a landlord employing a steward to let and manage his property necessarily involve in it a right to conclude agreements with tenants, not only without the sanction of the landlord, but contrary to the express directions of the landlord, because it must amount to that. I am of opinion that there is no such authority. It is admitted, that there is no evidence to shew that such is the custom, nor am I myself aware of any such custom, or that an authority could be implied from the mere fact that a person employed a steward to manage and let his property at a per centage or a fixed salary, which would entitle that steward to let a farm for a term of years, and for a reasonable rent, contrary to the direction of the landlord.

I take the law on this subject to be this:—that wherever a general authority is given by a principal to

to an agent, this implies and includes a right to do all subordinate acts incident to and necessary for the execution of that authority: then, if notice is not given to the person with whom the agent deals that the principal has limited his authority, the principal is bound. That was the case of *The Duke of Beaufort v. Neeld* (a). In that case Mr. *Wedge*, the Duke's agent, had a general authority to conduct the business of an inclosure, to attend the meetings, and to represent the Duke upon those occasions. The Duke gave him particular instructions, limiting his authority as to one part of the business, which restricted him from exchanging *Dunley Grove* except for woodland; but he did not communicate his instructions or those limits to his authority either to the commissioner or to the other party. The commissioner allotted lands, which were not woodland, for *Dunley Grove*, and the Lord Chancellor said, that if "the agent had acted inconsistently with the instructions which he received in that particular, being a general agent for the purposes of the inclosure, he considered, so far as his acts went, that they were binding upon the Duke." There are two other cases which, I think, express my view of this case very correctly, namely, *Fenn v. Harrison* (b), and *Pickering v. Bush* (c), and the result of those two cases may be said to be this:—Mr. Justice *Ashurst* in the former case, Mr. Justice *Bayley* in the second, stated generally to this effect, which draws the distinction pretty clearly:—"If the servant of a horse dealer, with express directions not to warrant, does warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed (d);" "but if

1856.

COLLEN  
v.  
GARDNER.

(a) 12 Cl. &amp; Fin. 248, 273.

(c) 15 East, 38.

(b) 3 Term Rep. 757.

(d) Ibid. 45.



CASES IN CHANCERY.

56. if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment (a)."

MILLEN  
v.  
GARDNER.

I mention that to illustrate the view which I take of this case. It comes simply to this, whether, as a general proposition, which I cannot find has ever been determined, and which is certainly one of considerable importance, the fact of a landlord employing an agent to manage and let his property at a salary, or at a percentage, does enable the agent to let a farm, not only without the sanction of the landlord, but contrary to the direction of the landlord, because, if it does, then the Plaintiff is entitled to recover. I am of opinion it does not, and that neither by the custom of the country, nor by any express authority of law, is any such authority given by a landlord to his steward by the appointment to manage and let his property.

Having come to this conclusion, all I can do is to dismiss this bill.

(a) 3 Term Rep. 761.

1856.

BUGDEN v. TYLEE.

March 1, 4.

**T**HE bill alleged, that by a deed, dated in 1838, *Thomas South* had settled some property, in trust for his daughter, the Plaintiff, *Mrs. Bugden*, and her children and other persons. That in 1851, *Mr. South* had appointed 2,000*l.*, part of the trust fund, in her favour, which had been paid, and that he had directed that it should be taken into account as part of her share in the trust premises, and deducted therefrom. That she had applied for an inspection of the deed, but that the trustee, *Tylee*, had refused to allow it, alleging that the Plaintiff and her children had no further interest in the trust premises, *Mr. South* having (under a power contained in the settlement) revoked the trusts of the settlement, so far as related to *Mrs. Bugden* and her children.

*A. B.* settled property on trust for the Plaintiff and others, but he reserved a power of defeating it. The Plaintiff alleged, that the trusts had been partially defeated by a subsequent deed, and called upon the trustee to produce the trust deed. The trustee in his answer stated, that the Plaintiff's interest had been totally defeated by the subsequent deed, which he did not object to produce, but he said, that *A. B.*, (who was not a party to the suit,) objected to the production. Held, that the Plaintiff was entitled to inspect it, but that the order could not be made in the absence of *A. B.*

The bill was filed by *Mrs. Bugden* and her children against *Mr. Tylee*, and it prayed the deposit, for inspection, of the deed of 1838, and, if necessary, that the trusts might be performed. *Mr. South* was not made a party to the suit.

The trustee, by his answer, stated, that by the deed of 1838, which was a voluntary settlement made by *Mr. South*, the property was to be held on trust for such persons as *Mr. South* should appoint, and in default, for *Mrs. Bugden*, her children and others. He then stated, that 2,000*l.*, part of the fund, having been appointed to *Mrs. Bugden*, had been raised and paid; and that *Mr. South* executed a deed of the 9th of

and that this deed further directed, that, in making a division of the remaining fund, the 2,000*l.* was to be brought into *hotchpot* by her, and that she had applied to see the original deed.

1856.

BUODEN  
v.  
TYLER.

In answer to that, the trustee makes this case:—he says, that although, under the deed of 1838, the Plaintiffs had originally an interest in the trust property, they have now no interest in it whatever; for the settlor has since irrevocably appointed the fund away from the Plaintiffs, and that, consequently, they have no interest at all in the fund, or in the deed which created the trust; that he sent the Plaintiffs a copy of the deed of 1853, which took away the Plaintiffs' interest under the original deed. Notwithstanding this, the Plaintiffs insist that they are entitled to see the original deed, which gives them an interest in the trust fund, in order to ascertain whether the whole of their interest has been exhausted.

I am of opinion, that the Plaintiffs are entitled to see the deed, to ascertain whether the statement made of it by the trustee is correct and accurate. Undoubtedly it may turn out to be such as is stated; but a person, originally a *cestui que trust*, and taking a benefit, and interest under a deed, and who alleges that it has been partially and not wholly exhausted by a subsequent deed, is entitled to see the original deed creating the trust, which is stated by him to be partially, and by the trustee wholly exhausted, by a subsequent deed.

However, in that view of the case, I shall not order the production of the deed itself, but allow the Plaintiffs to take any steps for the purpose of bringing the other persons interested in the matter before the Court.

wife as follows:—"All my interest in my house at *Lavender Hill*, the furniture, books, pictures, wines, &c., &c." After the date of his will, the testator removed from *Lavender Hill* to *Spencer Lodge*, taking with him furniture, books, pictures, wines and plate. He afterwards purchased more of these articles, and died at *Spencer Lodge*. The Court held, that his wife was entitled to the furniture, books, pictures, wines and plate which he had at the time of his death.

1856.

  
SPENCER  
v.  
SPENCER.

*The MASTER of the ROLLS.*

I am of opinion that this is a specific gift, which has been adeemed by giving up the house and taking away property. If a testator gave all the property in a particular spot, by taking away the property the gift is adeemed? If taken away for temporary purposes, it would still be held to be given, because intended to be returned. But here the taking away is permanent and there is no description of the gift, except as contained in the house. *Land v. Devaynes* does not apply. I must declare that the gift fails.

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1856.

## HOWARD v. HOWARD.

March 4.

Bequest to four persons equally, and "in case of the death" of any or either of them "in the lifetime of the other or others," their shares to go to "survivor or survivors of them." Held, that the survivorship had reference to the period of the testator's death.

THE testator bequeathed his personal estate as follows:—"Unto my brother, *George Howard*, and my nephews, *John Henry Howard*, *William Howard* and *Henry Howard* respectively, to be equally divided between them, and in case of the death of my said brother *George*, or of my said nephews, or any or either of them, in the lifetime of the other or others of them, then I direct that the share or shares of him or them so dying shall go to the survivor or survivors of them."

*William Howard*, the legatee, predeceased the testator, having died in 1854, and the testator died in 1855.

The question was, as to the interest which the surviving legatees took in the residue under this bequest.

Mr. Lloyd and Mr. Boyle, for the Plaintiff *John Henry Howard*, argued, first, that there was no lapse, and secondly, that the period of survivorship referred to was not the death of the testator, but a survivorship at any subsequent period, so that the last survivor took the whole fund. They cited *Walker v. Main* (a); *Cripps v. Wolcott* (b); *McDonald v. Bryce* (c); *Edwards v. Edwards* (d); *Roper on Legacies* (e); *Billings v. Sandford* (f); 2 *Jarman on Wills* (g); *Clarke v. Lubbock* (h).  
Mr.

(a) 1 Jac. &amp; W. 1.

(b) 4 Mad. 15.

(c) 16 Beav. 581.

(d) 15 Beav. 357.

(e) Page 1373 (4th ed.)

(f) 1 Bro. C. C. 393.

(g) Page 629 (2nd ed.)

(h) 1 Y. &amp; C. (C. C.) 49.

Mr. C. W. Lewis, *contra*, argued that the survivorship had reference to the period of division, which was the death of the testator.

1856.  
HOWARD  
v.  
HOWARD.

*The MASTER of the ROLLS.*

I am of the same opinion. Wherever a testator speaks of death hypothetically, there, death, being the most certain of all things, can only be made hypothetical by referring it to some particular period. Suppose you read this gift, leaving out the clause "in the lifetime of the other or others of them," in that case there could be no question as to the proper construction. The event referred to must have been the death of the testator, because he speaks hypothetically of an event which must certainly happen, viz. death.

But read it with these words—"in the lifetime of the other or others of them." Does it produce any effect? Does it not make the event of death more hypothetical or contingent than before? If you speak of the death of one of two persons in the life of the other, it is a certainty, for one must die in the life of the other. He speaks of the death of any or either of them in the lifetime of the other or others of them in a contingent sense, and the only way to make it contingent is by referring the event to some particular period, viz., the period of distribution. These words were intended to prevent a lapse by the death of any one of them in the life of the testator.

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1856.

## LANGSLOW v. LANGSLOW.

March 6, 8.

A testator had a power to appoint a fund, and his son (A.) and grandson (B.) were objects. Having by deed appointed part to his son, he, by will, reciting that the son could, under the hotchpot clause, be obliged to bring in the appointed part, proceeded, "and then as I make no further appointment," the whole settled fund must be equally divided between A. and B. He made A. his residuary legatee. It turned out that the hotchpot clause did not apply. Held, first, that the will did not operate as an appointment, and, secondly, that no case of election arose.

Precatory words will not create a case for election, neither will the absence of the execution of a power upon an erroneous impression, stated in the will, that, by its non-execution, A. (a legatee) will divide the fund equally with B.

BY the marriage settlement of Mr. and Mrs. Langslow, executed in 1818, certain funds were vested in trustees, for their benefit for their lives, and afterwards, in trust for the children, grandchildren, or other issue of the marriage, to be born before any appointment, as Mr. and Mrs. Langslow, or the survivor, should appoint; and for want of such appointment, upon trust for all the children of the marriage equally.

The settlement contained a clause, by which "no child" taking any part under an appointment, should share in the unappointed part, unless he should bring the sum appointed to him into hotchpot, "with the other children" of the marriage. This hotchpot clause was, therefore, applicable only as between the children.

There were two children of the marriage, namely Robert William Langslow and William Langslow. Mrs. Langslow died in 1847, and Robert William Langslow, the son, died in 1849, leaving an only son, the Plaintiff, Robert Langslow.

Mr. Langslow, in 1849 and 1851, appointed part of the fund to his son William. Mr. Langslow died in 1853, having made his will, dated the 28th February, 1850, by which he gave to his son William some portion of the fund.

and all other property which he might have at his death. He then proceeded as follows :—" He will have to bring into hotchpot that portion of the fund settled on the marriage of his dear mother, which has already been received by him, and then, *as I make no further appointment* under the power for that purpose, the whole settled fund will be equally divided between him and my little grandson," meaning the Plaintiff.

1856.  
  
 LANGSLOW  
 v.  
 LANGSLOW.

The residue of the trust fund consisted of 2,894*l.* 19*s.* Consols, and the questions raised by the special case were :—

First, whether the will of Mr. *Langslow* operated as an appointment of the 2,894*l.* 19*s.* Consols in favour of the Plaintiff.

Secondly, whether the Defendant *William Langslow* was bound to elect to give effect to the intention expressed in the will, that the whole fund should be equally divided between the Defendant *William Langslow* and the Plaintiff, or, in default, renounce the benefits given to him by the will.

Mr. *R. Palmer* and Mr. *Villiers*, for the Plaintiff. First, this, on the whole, is an appointment, direct or to be implied, in favour of the Plaintiff, who was an object of the power. Secondly, there is a clear intention that the Plaintiff should take half the trust fund, and the Defendant is bound to give effect to the testator's intention, under the doctrine of election. He must give effect to the whole of that which is the testator's will, or renounce the benefits intended for him.

They



1856. They cited *Wilson v. Piggott* (a); *Wombwell v. Hanrott* (b); *Foster v. Cautley* (c).

LANGSLOW  
v.  
LANGSLOW.

Mr. *Stallard* for the Defendant *William Langslow*. The will contains no appointment; for the testator, acting perhaps under a mistake, and after referring to the former appointments, expressly says, "I make no further appointment." Secondly, there can be no case for an election, where the testator has not attempted to dispose of property not belonging to him. An erroneous recital does not operate as a bequest; 1 *Jarman* on Wills (d); *Dashwood v. Peyton* (e); and when there is no gift, there is nothing between which you can elect.

Mr. *Freeling*, for trustees.

*The MASTER of the ROLLS.*

I think this was no appointment; it is impossible to say it is an appointment where the testator says, "I make no further appointment." I will consider the other point.

March 8. *The MASTER of the ROLLS.*

I disposed of the first question at the hearing, and on consideration I am confirmed in the view I then took. The testator, when he made his will, had already appointed a portion of the fund to *William*; he refers to that circumstance and says, "I make no further appointment." How can it be contended, that this is an appointment? It is only necessary to refer to the words, to shew that it can neither be so, either in form or in intention. It may be said, that if he had understood what

(a) 2 *Ves. jun.* 351.

(b) 14 *Beav.* 139.

(c) 6 *De G. M. & Gor.* 55.

(d) Chapter XVIII.

(e) 18 *Ves.* 27.

what the effect would be, he would have made an appointment, but that admits there was no appointment. I am, therefore, confirmed in the opinion I formerly expressed, that this is not an appointment, and the remaining fund must, therefore, go as in default of appointment.

1856.

LANGSLOW  
v.  
LANGSLOW.

The next question is, whether there is a case for election. I was desirous to look at the authorities, and I have since been referred to the case of *Blacket v. Lamb (a)*, which was decided by me, and appears to me to be exactly this point, and decisive as to the question of election. The expression here is this :—" he will have to bring into hotchpot that portion of the fund" already received by him, and then, as I make no further appointment, the whole will be divided between him and my grandson. This shews how he expected and believed the property would go, but it is no disposition of any part which creates the obligation to elect. It is sufficient to refer to the marginal note of *Blacket v. Lamb (a)*, which appears perfectly correct ; it is this :—" A testator duly appointed a fund in favour of objects of the power absolutely, and he also bequeathed to them his own property, "especially requesting them" to leave the appointed fund to persons not objects of the power. Held, that this did not raise a case for election. Held, also, that the result would have been different, if there had been a direct appointment of the subject of the power to strangers." There it was held, that a mere desire, expectation or wish, did not create any case of election.

This case cannot, I think, be put higher ; and I am therefore of opinion, that this special case must be answered by stating, that there is no appointment by this will, and no case for election.

(a) 14 *Beav.* 482.

1856.

JOHNSTON v. ANTROBUS.

March 8.

A testatrix bequeathed a legacy to A., his executors, &c., "but in case he should die leaving lawful issue," she bequeathed it to A.'s children. A. survived the testatrix. Held, that A. took a life interest only.

Bequest of a quarter of a residue to A., and, on his death, to his children, but if he should die without leaving lawful issue as aforesaid, then to B. and three other persons, and to the respective issue of such of them as should die leaving issue, such issue being intended to take the share which their parent would have taken if living. A. died in the lifetime of the testatrix without having been married. B. survived and had children. Held, that there was no lapse, but that one quarter of A.'s share passed to B., who took it absolutely.

THE testatrix bequeathed to her "nephew *James Charles Johnston*, his executors, administrators and assigns" (subject to the payment thereof of one-fifth of her debts) 3,000*l.* Consols, and all her *East India* Stock; "but in case he shall die, leaving lawful issue," then she bequeathed the same to trustees on trusts for the "children" of *James Charles Johnston*, who, being a son, should attain twenty-one, or die under that age, leaving issue at his decease, or, being a daughter, should attain that age, or marry, equally between them.

The testatrix then gave her residuary personal estate to the same trustees, "upon trust, to divide the same into four equal parts, and to pay one such equal fourth part unto her nephew *Thomas Glen Johnston*, his executors, administrators or assigns, and one other such equal fourth part to her nephew *Henry Johnston*, his executors, administrators or assigns, and one other such equal fourth part to her niece *Georgiana Johnston*, her executors, administrators or assigns, and the other remaining equal fourth part to her niece *Lilias Harriet Johnston*, her executors, administrators or assigns. But in case any one or more of my said four nephews and nieces shall die leaving lawful issue," then she bequeathed his or her share on trust for the children of such nephews and nieces respectively, who, being sons,

should

that it

should attain twenty-one, or die under that age leaving issue living at their deceases, or, being daughters, should attain that age or marry (the respective issue of my said nephews and nieces, if more than one of them shall so die leaving issue, being to take his, her or their deceased parent's share only). Provided always, "that in case any of them, the said *Thomas Glen, Henry, Georgiana* and *Lilias Harriet Johnston*, shall die without leaving lawful issue as aforesaid, then that the share and shares of him, her or them respectively so dying, in the said trust monies, shall go and be paid to the others or other of them my said nephews and nieces, and to my said nephew *James Charles Johnston*, and to the issue or respective issue of such one or more of my said nephews and nieces (including the said *James Charles Johnston*), as shall or may die leaving lawful issue, in equal shares and proportions, such issue or respective issue, if more than one, of my said nephews and nieces, including the said *James Charles Johnston*, as shall die leaving issue being intended to take the share or respective shares only which his, her or their parent, or respective parents, would have taken if living."

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 JOHNSTON  
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 ANTROBUS.

The nephew, *Henry Johnston*, died in 1850, in the lifetime of the testatrix, without ever having been married.

The testatrix died in 1854.

*James Charles Johnston* had several children, some born in the life of the testatrix.

This suit was instituted by *Thomas, Georgiana* and *Lilias Harriet*, for the administration of the estate, and to have the rights of the parties declared.

Mr.

1856.  
  
 JOHNSTON  
 v.  
 ANTROBUS.

Mr. *Follett* and Mr. *Cairns*, for the Plaintiff. *Gee*  
 v. The Corporation of *Manchester* (a); *Clayton* v.  
*Lowe* (b); *Woodburne* v. *Woodburne* (c); 2 *Jarman* on  
*Wills* (2nd ed.) (d).

Mr. *R. Palmer* and Mr. *Dryden*, for *James Charles*  
*Johnston*.

Mr. *Lloyd*, Mr. *Hobhouse* and Mr. *Curry*, for the  
 other parties.

*The MASTER of the ROLLS.*

The Consols and *East India* Stock are given to  
*James Charles Johnstone*, his executors, &c., "but in  
 case he shall die, leaving lawful issue," then in trust for  
 his children. I should be striking out the latter word<sup>s</sup>  
 from the will if I were to hold that he took an absolu<sup>e</sup>  
 interest in them. Such a construction has been suggest<sup>e</sup>d  
 in all similar cases. I considered the case in *Edwar<sup>d</sup>s*  
 v. *Edwards* (e), and came to the conclusion that th<sup>e</sup> he  
 period referred to was not the death of the testator, b<sup>u</sup>t  
 had reference to the death of the first taker, which cu<sup>ts</sup>  
 down the absolute interest first given to an estate f<sup>o</sup>r  
 life.

The case of the residue is different: one quarter - is  
 given to *Henry*, but in case he shall die leaving law<sup>fu</sup>l  
 issue, then in trust for his children; but in case he shou<sup>ld</sup>  
 die without leaving lawful issue, then over to the oth<sup>er</sup>  
 nephews and nieces, and to the respective issue of su<sup>ch</sup>  
 of them as shall die leaving lawful issue. Provisio<sup>n</sup>,  
 therefo<sup>re</sup>,

(a) 17 Q. B. 737.  
 (b) 5 B. & Ald. 636.  
 (c) 23 L. J. (Ch.) 336.  
 (d) Page 652.

(e) 15 Beav. 357, and see *A. Allen*  
 v. *Farthing*, 2 *Jarman on Wills*  
 (1st ed.) 688, and (2nd ed.) 49.

therefore, is made for both events. I think there was no lapse, and that *James Charles Johnston* must take an absolute interest in *Henry's* share, because the children were only to take such share as their parents would have taken if living at the time of distribution, which, as to this share, was at the death of the testatrix, consequently *James Charles Johnston* will take one-fourth of the share intended for *Henry*, by reason of his death unmarried.

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JOHNSTON  
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ANTROBUS.

Declare, therefore, that *James Charles Johnston* takes a life interest in the Consols and *East India* Stock, and an absolute interest in the share of *Henry Johnston's* one-fourth part of the residue.

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MESSER v. BOYLE.

**D**ADSWELL mortgaged some real estate to the Defendant *Boyle*. The Plaintiff afterwards, in April, 1854, obtained a judgment against *Dadswell*, who subsequently further charged the property to *Boyle*, who had notice of the judgment. So that, in effect, *Boyle* had two mortgages on the property, and the Plaintiff's judgment intervened between them. There were other judgments.

March 10.  
A judgment creditor, ranking after a first mortgagee, but prior in date to a further charge and to other judgments, held entitled to a foreclosure, although all the other parties insisted on a sale.

This was a suit for redemption and foreclosure.

Mr. *R. Palmer* and Mr. *Batten*, for the Plaintiff, asked for a decree for foreclosure and redemption. They cited *Jones v. Bailey (a)*.

Mr.

(a) 17 *Beav.* 582, and see *Cox Footner v. Sturgis*, 5 *De G. & Sm.* 736, and 2 *Spence's Eq.* 791.  
v. *Toole*, 20 *Beav.* 145, and

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Mr. *Follett* and Mr. *De Gex*, for the first mortgage, asked that there might be a sale under the Stat. 17 *Vict.* c. 86, s. 48, insisting that such was the proper decree.

Mr. *Fane*, for the mortgagor, and

Mr. *Erskine*, for a subsequent judgment creditor, supported the same view.

The MASTER of the ROLLS held, that the Plaintiff was entitled to a decree for foreclosure.

#### EGBERT v. BUTTER.

March 11.

A testator gave annuities to the Plaintiffs, and appointed three executors, one of whom (*A. B.*) was the residuary legatee. No fund was set apart to answer the annuities, but *A. B.* was permitted by his co-executors to receive the assets, which he wasted, though he paid the annuities for eighteen years, at the end of which he became insolvent.

Held, that the

co-executors were liable to the Plaintiffs for *A. B.*'s receipts.

A testator devised a real estate to *A. B.* for life, in terms which gave him the legal estate, and he bequeathed to him his personal estate, subject to some annuities bequeathed to the Plaintiffs, and appointed him an executor. *A. B.* wasted the assets. Held, that his life estate in the realty was not liable to make good the annuities.

THE testator died in 1836. By his will he devised his *Burleigh* estate to *Butter*, *Richard Hart* and *Oxenham*, their heirs and assigns, "upon trust, to permit and suffer his nephew, *Warwick Hunt*, to receive and take the rents, issues and profits thereof, for and during the term of his natural life." And after the determination of that estate in his lifetime, "then to the use and behoof" of the same trustees and their heirs during his life, in trust, to support contingent uses, "and for that purpose to make entries," &c. Yet nevertheless to permit him to receive the rents during his life, and "from and immediately after the decease of *Warwick Hunt*, to the use and behoof of *George Warwick Augustus Hunt*" (his eldest son) in tail, with divers remainders over. He made other devises and dispositions, and gave some annuities to the Plaintiffs, (his servants,) and the residue of his real and personal estate to

to *Warwick Hunt* absolutely, subject, as to his personal estate, to the payment of the debts and annuities. He appointed *Butter*, *Oxenham* and *Warwick Hunt* executors. The will contained an indemnity clause, declaring the trustees should not be answerable for more of the trust estate "than should actually come to his or their respective hands."

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The will was proved by the three executors. *Warwick Hunt* was allowed by his co-executors to possess himself of the whole personal estate, without making any provision for the Plaintiffs' annuities. He appropriated the same to his own use, and became insolvent: he had, however, paid the annuities until lately. The Plaintiffs, the annuitants, by their bill, alleged that *Warwick Hunt* had been allowed by his co-executors to receive the personal estate, upon his parol undertaking to pay their annuities out of the *Burleigh estate*, and that they had been paid accordingly. This was sworn to by *Warwick Hunt* himself, but was denied by his co-executors.

In 1854, *Warwick Hunt* made an equitable mortgage of the *Burleigh estate*, which was now vested in the Defendant *Shipton*.

The bill prayed an account of the personal estate, and sought to make *Butter* and *Oxenham* liable for the receipts of *Warwick Hunt*, and also for a declaration that the life interest of *Warwick Hunt* in the *Burleigh estate* was liable for the annuities.

Mr. *R. Palmer* and Mr. *Cuirns*, for the Plaintiffs. The life estate of *Warwick Hunt* is liable to make good the annuities, both on the ground of contract and on general principles. The contract is proved, and was part performed by payment of the annuities under it.



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In *Woodyatt v. Gresley* (a), it was held, that the interest which a party takes under a settlement is liable to make good any breach of trust or other liability which he may have incurred under it. Here the life estate is equally liable. So in *Morris v. Livie* (b), it was held, that "if an executor assigns his reversionary legacy, the assignee takes it, subject to the equities which attached to the executor, and therefore, if the latter, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust." Both as executor and devisee, therefore, his life interest, which is equitable, is liable to the Plaintiffs.

Secondly, the Plaintiffs' rights have priority over *Shipton's* equitable mortgage. The life estate is equitable, and, as between equities, priority in time prevails; *Priddy v. Rose* (c). Thirdly, *Butter* and *Oxenham*, who have allowed their co-executor to receive and misapply the assets, without making provision for the Plaintiffs' annuities, are personally responsible; *Styles v. Guy* (d).

Mr. *Lloyd* and Mr. *F. White*, for *Butter* and *Oxenham*. These Defendants are only liable for what they have received, for executors are not answerable for each other. Besides, this will contains an express indemnity clause, applicable to the very case, and, by the terms of the will, *Warwick Hunt* was himself to pay the annuities.

Mr. *Jessell*, for *Shipton*. No contract to charge the real estate is proved; it is alleged by one executor, and denied by the other. It is void under the Statute of Frauds,

(a) 8 Sim. 180.

(b) 1 You. &amp; Coll. (C. C.) 380.

(c) 3 Mer. 86.

(d) 1 Mac. &amp; Gor. 422, and

1 Hall &amp; Twells, 523.

Frauds, there being an absence of any written agreement, and the payment of the annuities is no part performance, for that act is referable to *Hunt's* character of executor; *Brennan v. Bolton* (a). Secondly, the life estate is legal, and not equitable, and therefore the cases do not apply.

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Mr. *Osborne*, for *Sturgis*, the assignee of *Warwick Hunt*.

Mr. *Rowcliffe*, for *Hunt*.

Mr. *R. Palmer*, in reply, insisted that there had been a part performance by payment, under the agreement.

*The MASTER of the ROLLS.*

I concur in the principle of the case in *Drury* and *Warren*, and think that the parol agreement was not binding on the mortgagee, and I must dismiss the bill as against him, with costs.

I also concur in this, that *Warwick Hunt* took a legal estate for life, and the authorities cited do not, therefore, apply to a case of this description.

The only remaining question is, as to the Plaintiffs' rights as against the other executors, and I think I must declare that they are, as regards the Plaintiffs, liable for *Hunt's* receipts.

(a) 2 *Dr. & War.* 349.

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DECREE.

*Butter* and *Orenham*, admitting that the personal estate was sufficient to pay the annuities to the Plaintiffs, declare they are personally liable to pay the arrears and growing payments thereof.

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March 10, 11,  
12, 13.

## DE TRAFFORD v. TEMPEST.

Distinction between a general and a particular residue.

A testator bequeathed particular chattels at his residence to A., and his chattels there "not thereinbefore otherwise disposed of" to B., and his general residue to C. The gift to A. lapsed by her death in the testator's lifetime. Held, that the chattels bequeathed to A. passed to B., as part of a particular residue, and not to C., as part of the general residue.

THE testator gave to his widow certain chattels, "which at the time of his decease might happen to be at or in or about his capital mansion, messuage or dwelling-house, at *Trafford Park*."

He subsequently bequeathed to his son, Sir *Humphrey de Trafford*, all his household and other furniture, &c., plate, &c., and chattels, "not thereinbefore otherwise disposed of (except moneys and securities for money) which at the time of his decease might happen to be at, in or about his said capital mansion, messuage or dwelling-house at *Trafford Park*."

The testator afterwards bequeathed his residuary estate to other persons.

The testator's wife died in his lifetime, and one question was, whether the chattels given to the testator's wife, the bequest of which had lapsed, passed to the son or the residuary legatees.

Mr. *Follett* and Mr. *Amphlett*, for the Plaintiffs.

Mr. *Lloyd*, Mr. *C. Hall*, Mr. *Rasch*, Mr. *Lewin*, and Mr. *Little*, for the Defendants.

*Easum v. Appleford* (a); *Malcolm v. Taylor* (b); *Leake v. Robinson* (c), were cited.

The

(a) 5 *Myl. & C.* 56.  
(b) 2 *Russ. & M.* 416.

(c) 2 *Merivale*, 392, 393.

*The MASTER of the ROLLS.*

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I think that this is a particular residue of all the chattels at *Trafford* Hall not otherwise sufficiently disposed of, and that the gift to the testator's wife having passed by her predeceasing him, the whole of the chattels at *Trafford* Hall, which were given to her, fell into that particular residue, and passed to the son, and do not fall into the general residue.

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*In re DENDY.*

March 13.

THE usual order was made, on the application of a client, for the delivery by his solicitor of his bill of costs within fourteen days, and for its taxation.

An order was made upon a solicitor for the delivery of his bill within fourteen days. He was unable to comply, and on a motion for the second order, he asked for further time. It was given, but he was ordered to pay the costs of the motion.

The time allowed elapsed, and the bill not having been delivered, the client now moved for the second order against the solicitor.

The solicitor said it was impossible for him to comply with the exigency of the order, and he required more time for the delivery of the bill. This was not contested, but the question arose whether he was not bound to pay the costs of this application.

Mr. *R. Palmer* and Mr. *Renshaw*, in support of the motion, relied on *In re Bainbrigge (a)*.

Mr.

(a) 13 *Beav.* 108 and 14 *Beav.* 33; and *In re Christmas, ibid.* 45; and see *Re Dufaur*, 16 *Beav.* 113; *Re Minter*, 19 *Beav.* 519.

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Mr. *Jessel*, *contra*. First. Costs are never given on orders like the present. Secondly. It having been proved to be impossible for the solicitor to comply with the exigency of the first order, the Court will make no further order, as was the case *In re Ker* (a).

*The MASTER of the ROLLS.*

I think the solicitor must pay the costs. I cannot tell whether he can or not make out his bill of costs until he has tried, and it is the duty of every solicitor to have his books and accounts ready. I treat him in the same situation as a person asking an indulgence, and for an extension of the time fixed by the rules of the Court.

I give him further time, but he must pay the costs of the application.

(a) 12 *Beav.* 390.

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## CAMPBELL v. INGILBY.

**A**N estate, called "*The Kettlethorpe estate*," was, by a deed dated in 1795, limited to Sir *William Ingilby* for life, remainder to his first and other sons in tail, remainder successively to each of his sisters, *Elizabeth*, *Augusta*, *Diana* and others, for life, with remainders successively to their first and other sons in tail general.

Another estate, called "*The Harrington Estate*," was, by the will of Mrs. *Buckworth*, dated in 1808, devised to *Augusta Ingilby* and her heirs, provided, that in case she should, at any time during her life, become entitled in possession to the *Kettlethorpe* estates, under the settlement of 1795, then and from thenceforth the testatrix devised the *Harrington* estates to *Diana Ingilby* and her heirs.

On the 18th of *April*, 1811, *Diana Ingilby* married the Plaintiff, Mr. *Campbell*.

Previous

On the marriage of a lady, her brother and heir presumptive became a trustee of her real estate. He afterwards purported to convey it to new trustees, and he also executed a deed reciting that she was of age on her marriage. On her death, it turned out that, under a common mistake, she was an infant at her marriage, and that her settlement was inoperative as to her real estate, which descended on the brother as her heir. Held, that the brother was not bound, by his acts, to give effect to the settlement.

On their marriage, a lady and her husband covenanted to settle her real estate, on trusts, under which the husband was to have a life estate therein, and the wife obtained benefits in her personalty which she would not have been otherwise entitled to, and had a power to appoint a fund by will. She appointed it to strangers, and on her death the settlement turned out to be inoperative as to her real estate, she having been an infant when she executed it. The husband lost his life estate in it. Held, that the appointees were not volunteers but purchasers under the wife, and that the husband was not entitled to compensation, out of the wife's personal estate included in the settlement, for the loss of his life estate in the wife's realty.

Mar. 5, 6, 24.

In the case of marriage contracts, it is impossible to set them aside after the marriage, on the ground of a failure of a pecuniary consideration on one side.


A settlement made during a lady's infancy held inoperative as regarded her real estate only, and she and her heirs were held not bound to elect either to give effect to the settlement as to the real estate, or abandon benefits in personal estate conferred on her by the settlement.

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Previous thereto, by articles dated 17th *April*, 1811, and made between *William Campbell* (the father of the Plaintiff) of the first part, the Plaintiff, his eldest son, of the second part, *Diana Ingilby*, of the third part, and Sir *William Ingilby* and his father of the fourth part, after reciting that, under the settlement of 1795, *Diana Ingilby* was entitled to a life or some other estate in the *Kettlethorpe* estate, and that under the will of Mrs. *Buckworth* she was entitled to an estate for life or some other estate in the *Harrington* estate, and possessed of a sum of 4,000*l.*, and that, under the same will, she was entitled to one-third of some money in the funds, Mr. *Campbell* and *Diana Ingilby* covenanted with Sir *William Ingilby* and his father, as soon as might be after the marriage, to convey to them all the premises and money of *Diana Ingilby*, to be held, as to the 4,000*l.* for the separate use of *Diana Ingilby* for life, with remainder absolutely to her husband; and as to the other real and personal estate, for Mr. *Campbell* for life, with remainder to *Diana* for life, with remainder to the children of the marriage, except the eldest, with remainder, in default of such issue, as to the hereditaments, in trust for the heirs of *Diana*, and as to the stock, for *Diana* if she should survive the Plaintiff, but if not, then as she should by will appoint, and in default of appointment, to her next of kin. And the Plaintiff covenanted, that any future property coming to *Diana* should be settled on the same trusts; and the Plaintiff's father covenanted with the trustees to grant to *Diana* a rent charge of 200*l.* for life, charged on his *Fairfield* estate, to take effect on the decease of the Plaintiff.

At the time of the marriage of *Diana Ingilby*, it was taken for granted that she was of age, but it turned out that, having been born in *September*, 1790, she wanted a few months of twenty-one years of age. She was therefore

therefore an infant, and her contracts invalid. No settlement was executed after the marriage, but Sir *W. Ingilby* had been party to a subsequent deed, which recited that *Diana* had attained twenty-one before her marriage, and by another he had conveyed the trust estates to new trustees.

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*Diana Campbell*, during her life, received the interest of the 4,000*l.* She had issue, an only son, who died in 1835, without issue, at the age of twenty-three. There were, therefore, no younger children of the marriage.

On the 17th of *April*, 1835, Mrs. *Campbell* made her will, and in pursuance of the power reserved to her by the articles, appointed the stock, not to her husband, but to other persons. She died in 1841, leaving Sir *William Ingilby* her heir at law.

Sir *William Ingilby* by his will, dated in 1851, devised all his real estates to the Defendants on trust, and he died on the 14th of *May*, 1854, without issue. His sister, *Elizabeth Ingilby*, died on the 15th of *June*, 1854, without having been married, and thereupon *Augusta Ingilby* became entitled in possession to the *Kettlethorpe* estates, upon which event happening, the *Harrington* estates became subject to the executory devise in favour of Mrs. *Campbell* and her heirs.

In this state of things, the devisees of Sir *W. Ingilby* claimed to be entitled to the *Harrington* estates, freed from any life estate therein of the Plaintiff, Mr. *Campbell*. The grounds on which they based their claim were these:—that the articles of 1811, having been made during the infancy of Mrs. *Campbell*, were not binding on her, nothing having been afterwards done, as by fine, &c., to give them validity. That, therefore, her interest in the *Harrington* estate, under the executory devise,  
 passed,



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passed, upon her death, in 1837, to Sir *William Ingilby*, her heir, and that it afterwards passed, under his will, to the Defendants, though the estate did not fall into possession until *June*, 1854.

The Plaintiff, however, insisted that he was entitled to a life interest in the *Harrington* estate by virtue of the marriage articles.

Mr. *R. Palmer* and Mr. *W. D. Lewis*, for the Plaintiff, Mr. *Campbell*.


Assuming the settlement to have been ineffectual as to the real estate, by reason of the infancy of Mrs. *Campbell* at the date of its execution, still she subsequently adopted and confirmed it, by accepting the benefits under it during her life, and by the execution of the power of appointment reserved by it to her. She was bound, after attaining twenty-one, to elect to take either under or against the settlement, and to affirm or repudiate it *in toto*; *Milner v. Lord Harewood* (a). It was to her interest to take under the settlement, and having regard to her acts after attaining twenty-one, she must be taken to have done so; *Ardesoife v. Bennet* (b); *Dillon v. Parker* (c); *Stratford v. Powell* (d); *Worthington v. Wiginton* (e); *The Earl of Darlington v. Pulteney* (f); *Edwards v. Morgan* (g); *Robinson v. Wheelwright* (h); *Dyne v. Costobadie* (i); 1 *Roper* on Husband and Wife, 2nd ed. (k).

Secondly, Sir *William Ingilby* and those claiming under

- (a) 18 *Ves.* 276, 277.
- (b) *Dick.* 463.
- (c) 1 *Swan.* 359.
- (d) 1 *Bull & B.* 24.
- (e) 20 *Beav.* 67.

- (f) 3 *Ves. jun.* 384.
- (g) *M'Cl. & Y.* 258.
- (h) 21 *Beav.* 214.
- (i) 17 *Beav.* 140.
- (k) Page 566.

under him are estopped, by his having, while heir presumptive, been a party to and executed the settlement itself, by his subsequent conveyance of the real estate to new trustees, and by the recitals contained in another deed. He is bound at law by the doctrine of estoppel; *Doe v. Oliver* (a); and he is equally bound in equity by the trusts of the settlement. He accepted the office of trustee under a deed entered into for valuable consideration, which stated an agreement to settle the wife's real and personal estate, and contained a covenant to settle it, and he afterwards took on himself to convey those estates. At law, therefore, he is bound by estoppel, and in equity he cannot repudiate the trust which by the deed he has accepted.

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Thirdly, all parties to the deed are bound to make good the representations on which the contract was founded. The Plaintiff contracted the marriage, and both he and his father entered into engagements on the faith of the validity of the settlement. They proceeded on the representations and on the general understanding and belief that Mrs. *Campbell* was of age; Sir *William* was a party to this arrangement, and he cannot be allowed to disappoint the Plaintiff and defeat the settlement. He and his representatives must make good the representation, the belief of which was the foundation of the contract, even though no intentional deception was practised. Knowing, as he must have done, that his sister was under age, it was the duty of Sir *W. Ingilby* to have stated that fact. In cases of misrepresentation and fraud, even infants and married women are bound. Thus, in *Cory v. Gertcken* (b), an infant concealing his infancy obtained payment from the trustees, it was held, that "the concealment of his infancy, under such

(a) 2 *Smith, L. Cas.* 417.

(b) 2 *Madd.* 40.

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such circumstances, certainly was a fraud and precluded him or his assignees (who stood precisely in his situation) from calling for a repayment" after he came of age. In *Vaughan v. Vanderstegen* (a), a married woman borrowed money, fraudulently representing herself to be single, it was held that her appointed estate was liable for the consequences. In *Bulkley v. Wilford* (b) the solicitor, who was also the heir at law of a testator, advised the levying of a fine which revoked the will, and then claimed the estate; but he was held to be a trustee for the devisee.

Fourthly, the settlement is either good or bad; if the real estates are not bound, the consideration, as regards the Plaintiff, fails, and the settlement is void *in toto*. The Plaintiff and his father cannot be held bound by the settlement, if it be not binding on all the parties to it, and the personal estate, to which the Plaintiff would be entitled in the absence of the settlement, ought not to be taken away from him, without recouping him for the loss of the real estate for which he has contracted, that is without giving him compensation; this was done in *Savill v. Savill* (c). For that purpose, the appointment ought to be declared void as against him.

Mr. *Baily* and Mr. *Nalder*, for the executors of Mrs. *Campbell*, argued, that the Court, though it could set a contract aside, could not make a new one for the parties, and that the marriage consideration could not be recalled. They contended that *Savill v. Savill* did not apply, and cited *Pulvertoft v. Pulvertoft* (d); *Lloyd v. Lloyd* (e); *Field v. Brown* (f); *Cave v. Cave* (g).

The

(a) 2 *Drew.* 165.  
 (b) 2 *Cl. & Fin.* 102; 8 *Bli.*  
 (N. S.) 111.  
 (c) 2 *Colly.* 721.

(d) 18 *Ves.* 84.  
 (e) 2 *Myl. & Cr.* 192.  
 (f) 17 *Beav.* 146.  
 (g) 15 *Beav.* 227.

*The MASTER of the ROLLS.*

I can relieve the trustees of the will of Sir *William Ingilby* from two points. As to the real estate, my own decision in *Field v. Brown (a)*, affirmed by the Lords Justices, renders it impossible for me to hold, that Mrs. *Campbell* or her heirs are bound by the agreement as to the real estate, for being an infant she was incapable of contracting. I express no opinion as to the effect of a person entering into a contract, making false representations with a fraudulent intention; there is nothing of the kind here. I have no doubt that an infant may commit a fraud, but this is a simple case of an infant entering into a marriage settlement. I am of opinion that this was not a binding contract, and that when she came of age, she was not bound to do anything in respect of it; she died, and all the rights remain the same. Sir *William Ingilby* was in no way affected by it; he happened to be one of the trustees of the marriage settlement and her heir presumptive; but it is impossible for me to say that he was bound by the articles. It is then said, that he is estopped, because he afterwards executed two deeds; but I cannot understand the doctrine of estoppel applying to such a case as this. If a person obtains a benefit under a deed he cannot afterwards dispute the validity of it, but here there was a mere common mistake, which, in my opinion, in no respect bound the parties. I am of opinion that I must hold that this settlement is not binding on the real estate of this lady; with respect to the other parts of the case I should like to hear Mr. *Lloyd*.

Mr. *Lloyd*, Mr. *Cairns* and Mr. *H. R. Young*, for the trustees of the will of Sir *William Ingilby*, were then heard on the other points.

Mr.

(a) 17 *Beav.* 146.

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Mr. R. Palmer, in reply, cited *Croome v. Lediard* (a).

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I will consider the case.

March 24.


*The MASTER of the ROLLS.*

The question which I disposed of at the hearing was not whether the real estate passed under the settlement, because it was admitted that it did not, but whether the trustee, who, at the date of the settlement, was the presumptive heir of Mrs. Campbell, and was her heir-at-law at her death, was bound by what took place on the marriage, and ought to make good the consequences arising out of the fact, which it was asserted he had alleged, viz. that she had then attained her age of twenty-one years, and whether the deeds which were afterwards executed by him, asserting the same fact, did not establish him, and all persons claiming through him, from asserting or alleging the contrary, and, consequently, whether he, having taken her real estate, would not be bound, in the events that happened, to make good that assertion so far as to support the uses of the settlement.

I disposed of that question at the hearing, and further consideration has confirmed me in the view I then took, and I am of opinion, not only that the real estate did not pass, but that there was a common mistake; that nobody attended to the circumstance or supposed that it was necessary accurately to inquire into this fact, for the purpose of giving validity to the marriage articles which

(a) 2 Myl. & K. 257.


which were then executed ; that there was nothing approaching to fraud, or which, in the most strained acceptance of the term, could be considered as amounting to any resemblance of fraud in the case ; and that consequently, the parties must be left to the legal consequences which necessarily flow from such a transaction, untainted by wilful misrepresentation or wilful concealment of any fact.

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The next question that arose was, whether the wife could be put to her election, and whether she could claim as against the husband the personal estate, which, but for this settlement and his covenant to settle her personal property, entered into in consideration of the settlement of her real estate, would have gone to him solely.

It was suggested, that, in this respect, the settlement should either be reformed, or that the wife should be compelled to elect either to take all that was given by the settlement, performing her part of it, or to give up that which the husband would have taken unless he had contracted to settle her personal estate : and it was argued that, in the events which have happened, it must be considered that she has so elected, and, consequently, that compensation must be made to the husband out of the personal estate which she has appointed.

It is important, in my opinion, to consider, how this case would have stood if Mrs. *Campbell* were now alive, and the discovery of her infancy had been made immediately after the marriage. The view I take of the case is hypothetical, for the purpose of examining and testing the law as applicable to this case, because the evidence convinces me, that if this lady or her husband had been aware of the circumstance, she would, by means of a fine

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and acknowledgment, have settled her real estate subsequently to the marriage. I consider it is important to regard this contract in the way in which it would have been viewed, if Mrs. *Campbell* were now alive, and it had been discovered, that the real estate was not bound, and then see whether she could have been compelled to settle it? I am of opinion that she could not. The only mode in which the real estate of the wife could be bound, would be either by fine or by a conveyance executed by her, and acknowledged under the Statute for the Abolition of Fines and Recoveries. No Court could have compelled her to do this, for the acknowledgments would be ineffectual unless given of her own free will, and without this no settlement could have been made of her real estate.

What, then, are the consequences that flow from that? Would the rest of the articles be valid? The consideration for the articles, which was marriage, had, if I may use the expression, already been paid, and so far as it bound the parties, it was totally impossible to set it aside; it could not be recalled, the marriage was binding on the wife, although an infant, as soon as the ceremony had been performed; and although it may be perfectly true, that the husband would not have entered into the marriage contract without an express agreement that the real estate of the wife should be settled, yet, although it turns out that the real estate is excluded, without any fraud or anything equivalent to fraud, the rest of the contract must, in my opinion, stand, and this Court must act upon it.

If authorities were wanted for this proposition, they are numerous. They come down from a very early to quite a late period. In a case, *North v. Ansell* (a), the husband

(a) 2 P. Wms. 618.

husband, in consideration of 500*l.*, which he was to have with his wife, agreed that she should have a power of appointing 200*l.* out of his estate. Having lived together fifteen years, she died, and appointed 200*l.* to certain persons. The appointees under her will sought to enforce payment against the husband. The husband resisted it, on the ground that of the 500*l.* he had never received more than 300*l.* But the Court would not listen to that, and said the settlement must be executed and carried into effect, exactly in the same manner as if he had received the consideration, and that the principal consideration for the contract was marriage.

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This is gone into very fully in *Harvey v. Ashley* (a), in which Lord *Hardwicke* points out that a marriage contract cannot be set aside, or rescinded, and for this reason:—because there are third parties, as children who may be born, who are purchasers under the contract, and it is totally impossible to set aside the contract as regards them. For that reason, in the case of marriage contracts, even though the relations of the husband or wife may fail in the performance of what they have covenanted to do, still that will not invalidate the rest of the contract, where it has been followed by marriage. *Perkins v. Thornton* (b), is to the same effect.

There is also *Lloyd v. Lloyd* (c), which is a very strong case, and very clearly illustrates the proposition laid down by former cases. The father of the husband covenanted to pay a sum of money, and to settle land on the husband, wife and issue of the marriage; in consideration of which, the father of the lady contracted to settle lands and pay a sum of money in like

(a) 3 *Atk.* 607.

(b) *Ambl.* 502.

(c) 2 *Mylne & C.* 192.



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like manner. There were, no doubt, several and independent covenants, one in consideration of the other; but the great consideration was marriage. The marriage took effect; the father of the lady failed to perform his part of the covenant, and it was not possible to enforce it. It was nevertheless held, that the father of the husband was bound to perform his part of the covenant, and that he must complete it. The principles laid down in those cases establish very clearly, that so far, at all events, as purchasers are concerned, the contract must be carried into effect, and will be enforced.

Then it is contended, that although this may be true as relates to purchasers, it does not apply to volunteers under a settlement; and that, in point of fact, the appointees of the wife are volunteers under the settlement. I think it unnecessary to inquire how far this Court would, at the instance of one party to a marriage contract, after the marriage had taken place, order a settlement to be executed in conformity with the articles in favour of some collateral person, who was not within the consideration of marriage. It is not necessary, in my opinion, to consider that question in this case. It is undoubtedly true, that there are many cases in which one person may, for value, contract with another to confer a benefit upon a third person, who has contributed no portion of the consideration. That species of contract is binding between the parties (*a*), and if any authority were wanted for that principle, it will be found to be clearly recognized by the Lord Justice *Knight Bruce*, in the case of *Davenport v. Bishopp* (*b*), in which there is a *dictum* to that effect. I do not, however, think  
it

(*a*) See *Colyear v. Mulgrave*, 2 *Keen*, 81.

(*b*) 2 *You. & Coll.* (C. C.) 45.

it necessary to consider that question upon the present occasion.

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The case of *Savill v. Savill*(a) determined, that where parties enter into a marriage contract, which, by reason of the course of events, failed with respect to the acts to be done by the wife, the acts contracted to be done by the husband should not be held binding upon him, so far as collaterals were concerned, who were not within the scope of the marriage contract. That is the general effect of the case. There the case was to this effect,—the husband, on his marriage, settled all the personal property of the wife, and the wife agreed to settle her land when she came of age. The marriage took effect, but she died an infant, and there was no issue of the marriage. The heir, who was also one of the next of kin, insisted that the land was not bound, and this the Court held to be the case. But she also claimed an interest in the personal estate, under the ultimate limitation in the settlement; the Court, however, held, that the next of kin, who, in a sense, were volunteers, could not be allowed to claim the benefit of part of the contract against the husband, who was not permitted to have the benefit of the whole of it, and that, as against the volunteers, he was entitled to compensation, out of the personal estate, for the loss of the interest in the real estate which the marriage articles purported to give him.

That brings me to consider this question, are the appointees purchasers or volunteers under this settlement? The appointees are not persons named in the articles; they do not take as persons named in favour of whom the contract is made. The next of kin, it  
may

(a) 2 Cully. 721.

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may be said, do so, for the property is limited in this way,—after the death of the survivor to the children of the marriage, and in default of children, as the wife shall appoint, and in default of appointment, to the next of kin, as if the wife had died unmarried; thereby excluding the husband, who would have been entitled, by force of law, in case the property had been treated as that of the wife. In that case, therefore, it may be said, that the next of kin are persons named, who are to take under the marriage contract, in a particular event, but who are not within the consideration of marriage. But the appointees are not so; they take by virtue of the gift of the wife. The wife is within the consideration of marriage, and she contracts, that in consideration of the marriage, she shall be at liberty, in case there should be no issue of the marriage, to deal with the money as she shall think fit, by appointment by will. It is a contract entered into by her for her own benefit, the consideration of which is marriage. In one sense the appointees are volunteers, that is to say, they are volunteers as between her and themselves, but they take by virtue of a gift made by one who is not a volunteer but a purchaser, and therefore as between themselves and the husband, they are not volunteers, but they claim under, and stand in the situation of a purchaser.

I may illustrate the distinction which I take by another similar instance. Suppose, under a contract of marriage, a son had acquired a vested interest, which he might dispose of upon attaining twenty-one, and that he had by will given it to *A. B.* *A. B.*, no doubt, if he had been named in the settlement as the person to take in default of appointment, would have been a volunteer; but as he takes under the will of a child, who is a purchaser under the marriage settlement, he stands

stands in the shoes of the person under whose appointment he takes, and is therefore entitled to stand in the situation of a purchaser. In my opinion, therefore, although the case of *Savill v. Savill* might have applied if Mrs. *Campbell*, in this case, had died without making any appointment, and might have applied as against the next of kin, it does not apply, as against the appointees, taking by virtue of the appointment of the wife, who contracted for that power for her own benefit, and is a purchaser under the settlement, and which appointees stand in her place. It appears to me that this case depends very much on the same question, viz. whether the marriage articles are valid or not, and whether the Court could, after the marriage, have carried them into effect, by directing a settlement of the rest of the property, omitting the real estate of the wife, or whether she could have been compelled to elect, either to settle the real estate, or to give up the benefits in the personal estate, for which she had contracted with her husband, and forego the other advantages which she would have obtained. Excluding any question of misrepresentation, which might vary the case, the wife could not, in my opinion, in such a case, have been put to her election, and I think this point is involved in the question whether the settlement was a good one or not. By whom could she have been put to her election? Could the husband have called upon her to elect either to settle her real estate or renounce the benefit of his covenant, by which he had contracted that certain money should go to the issue? I have already shewn that he could not do so, so as to affect the issue of the marriage. Could she have done so, so as to affect herself and her own interests, provided there had been no issue of the marriage? I am of opinion that, both upon principle and authority, she could not, and the case

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case of *Frank v. Frank* (a), to which I shall presently refer, and another case, seem to establish that proposition. Still less, even if the question of election had arisen, could she have been said to have elected without having been aware of the circumstance, and without knowing all the facts which related to the case.

The case to which I was referred, and which was very strongly insisted on, as governing the present, was *Ardesoife v. Bennet* (b), but I am at a loss to see how it bears on this case.

*Ardesoife v. Bennet* (b) was a case of this description:— In the first place, it was not the case of a wife electing to take anything as between herself and her husband. It was no case of that description at all. The question did not arise upon a marriage contract, or upon any question which related to persons claiming under or by virtue of a marriage contract. The facts of the case were these:—a person of the name of *Wilson* bought a copyhold estate, and immediately after he had bought and paid for it, he made his will, by which he left the copyhold estate to his mother; he left a legacy of 5,000*l.* to his sister, who was his heiress at law and a married woman, and he left it to her for her separate use, with certain directions, that she should have a power of appointment over it, and that if she did not appoint it, it should go to her next of kin. He died immediately after having made the will, and as he died before being admitted to the copyhold, the will was inoperative, and did not pass the copyhold. What took place on the death of the son was this:—the mother was immediately put into possession

(a) 3 *Myl. & Cr.* 171.

(b) 2 *Dick.* 463.

possession of the copyhold, she was admitted, the daughter took the 5,000*l.*, and this continued for five years, and then the daughter died, leaving a son, who was the heir of the testator, and thereupon, the father, as the guardian of the son, procured himself, or his son, to be admitted, and excluded the mother. A bill was then filed in this Court; and it was held, in that state of circumstances, that the sister, who during her life was the heir at law, had elected to take the legacy and not to take the land. No doubt she was a married woman at the time, but she was not a married woman so far as regarded the legacy, for the legacy was expressly given to her for her separate use, and she had the power of disposing of it exactly in any manner she thought fit. This Court no doubt would not have allowed her to take the legacy and the land, and the legacy being of greater value than the land, it was held, there had been a concluded election, and that all the parties were bound.

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I do not see in what way that case can be treated, as affecting the question of whether a husband and wife, after coverture, can, by contract between them, vary the marriage articles, and so give the husband something which possibly he would not have given up, unless he had expected to receive something from another quarter, which he did not receive.

The case of *Frank v. Frank* (a), appears to me to be very clear and distinct upon this point. *Frank v. Frank* was the case of a married woman, who during the coverture had agreed to take a jointure from her husband, in lieu of dower. After his death, it was held, that she had not the contracting power to do so; that she could not elect to take jointure in lieu of her common

(a) 3 *Myl. & Cr.* 171.

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mon law right to dower, and accordingly that the arrangement was not binding upon and in no degree affected her.

There is a case, reported very shortly, and not very distinctly as to all the points, which, as far as it goes, seems to be clear upon this question; it is *Hancock v. Hancock* (a), and it was a case of this description: the marriage articles expressly agreed that the wife should have the power to take the sum of 3,000*L.*, if she thought fit, or in default of her taking it, 400*L.* a year should be settled upon her and the issue of the marriage. The case says, that she elected to take the 3,000*L.*, nevertheless, at the instance of the children, that was set aside, and a settlement of 400*L.* a year upon the wife and children was decreed, I presume, upon giving up the 3,000*L.*, although that does not appear by the report of the case.

That shews very clearly that there could be no power to contract as against persons who are purchasers under a settlement, nor does it appear to me that there is power to contract as between the husband and wife in such a matter as this relates to.

Therefore, not in the slightest degree impeaching the authority of *Savill v. Savill*, but on the principle that this contract is a binding and valid contract, in consideration of marriage, which is the primary and great consideration which binds the whole contract, and all the parties to it, I am of opinion that it cannot be varied subsequently, and that, consequently, the appointees who take under the gift of the wife, who was a purchaser, are entitled to the benefits which they so claim, that

(a) 2 *Vern.* 665.

that no case of election arose, and that no election was made, and therefore I shall make a declaration to carry into effect the view which I have expressed with respect to this part of the case.

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IN 1795, a settlement was made, by which "the *Kettlethorpe* estate" was settled in a manner which it is not necessary to state in detail (a).

In 1808, *Frances Buckworth* devised "the *Harrington* estate" to *Augusta Ingilby*, in fee, with an executory devise over to her sister, *Diana Campbell*, in fee, in the event of *Augusta*, in her lifetime, coming into actual possession of the *Kettlethorpe* estate under the settlement of 1795.

What happened was this:—*Diana Campbell* died in 1841, without leaving issue. Her real estates thereupon descended on her brother and heir at law, *Sir William Ingilby*. He died, without issue, in *May*, 1854, having, by his will, dated in 1851, devised his residuary real estate to trustees for sale, but the *Kettlethorpe* estate thereupon descended, under the limitations contained in the settlement of 1795, on his sister, *Elizabeth Ingilby*. She died unmarried in *June*, 1854, and the *Kettlethorpe* estate thereupon passed, under the settlement of 1795, to *Augusta*; and under the shifting clause in the will of 1808, "the *Harrington* estate" passed to the representatives of *Diana*, in fee. The question was, whether the contingent interest, which in 1841 descended to

March 7, 14.

A contingent estate in fee under a shifting clause may be devised both by the old and new law.

Devise of estate X. to A. in fee, with an executory shifting limitation to B. and her heirs, in the event of A. becoming entitled to another estate, Y. B. died first, and her estate descended on C., her heir, who by his will, in 1851, made a general devise of his real estate. Some months after his death, the event took place on which the X. estate was to shift from A. to B. Held, that the estate X. passed by C.'s will, and did not descend either to the heir of B. or of C.

Sir

(a) But see *ant*2, p. 568.



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Sir *William* from his sister *Diana*, and came into possession after his death, and in *June*, 1854, had or had not passed by his will.

The Plaintiffs were the devisees under the will of Sir *William Ingilby*. The Defendants were the co-heirs at law of Sir *William Ingilby* and of *Diana Campbell*.

Mr. *R. Palmer* and Mr. *H. R. Young*, for the Plaintiffs. Possibilities are devisable, and pass by descent; *Goodtitle d. Gurnall v. Wood* (a); *Jones v. Perry* (b); and contingent, springing and executory uses are also both descendible and devisable; *Selwin v. Selwin* (c); *Paterson v. Mills* (d); *Fearne's Cont. Rem.* (8th ed.) (e). The heir of a purchaser, though never in possession, can devise the estate; *Doe v. Murtyn* (f); therefore the *Harrington* estate passed to the Plaintiffs under the will of Sir *William Ingilby*. They also cited 3 & 4 Will. 4, c. 106, s. 2.

Mr. *Lloyd* and Mr. *Dickinson*, in the same interest. If an interest in an estate is descendible, it is devisable. Now it is admitted on both sides to be descendible, for the Defendants claim it as heirs by descent. *Diana* could herself have devised her interest; then what was there to prevent its being devised in the interval between her death and that of *Elizabeth* by the parties in whom it was then vested in interest? The only possibilities which are incapable of passing by will are those without an interest, as the *spes successionis* of the heir. They cited *Moor v. Hawkins* (g).

The Solicitor-General (Sir *R. Bethell*) and Mr. *Cairns*,  
*contra*.

(a) *Willes*, 211.

(b) 3 *Term Rep.* 88.

(c) 1 *W. Blackst.* 222, 251.


(d) 19 *Law J., Ch.*, 310.

(e) Pages 368, 371.

(f) 8 *Barn. & Cr.* 510.

(g) 2 *Eden*, 342.

*contra*. No doubt, an interest in an estate which is descendible is also devisable, but Sir *William Ingilby* had no interest in this estate which was descendible to his own heirs. Under the old law, the descent was traced from the person last seised, when the estate was of such a nature that seisin could be had of it; thus, in regard to estates in remainder or reversion, the descent was traced to the last purchaser; *Watkins* on Descents (*a*). The rule of descent "requires that a person who claims a fee simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir to such purchaser at the time when that reversion or remainder falls into possession;" *Fearne*, Cont. Rem. 8th ed. (*b*).

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Thus in *Goodright v. Searle* (*c*), a testator devised lands to his son *G.* in fee, but if he died under twenty-one, &c., to *P.* (the testator's mother) in fee. *P.* died, and afterwards *G.* died under twenty-one, &c. It was held, that the lands vested in that person who was heir at law of *P.* (the first purchaser) at the time the contingency happened. So in *Goodtitle d. Vincent v. White* (*d*). Upon a devise in trust for the testator's only daughter *M.* "till she arrived at the age of twenty-one;" and in case of *M.*'s death "before she arrived at twenty-one," then to *B.* his wife: it was held, that *B.*, the mother, took an executory devise in fee, which, upon her death, descended to the daughter: upon whose death, under twenty-one, the fee which she had *ex parte paternâ* during her life descended to her heirs *ex parte maternâ*.

When the estate of *Diana* fell into possession, in  
*June*,

(*a*) Page 120.  
 (*b*) Page 561.

(*c*) 2 *Wilson*, 29.  
 (*d*) 15 *East*, 174.

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*June*, 1854, her heir at law at that time, and not the heir at law of Sir *William*, became seised; *Doe v. Hutton* (a). The estate was not descendible to the heir of Sir *William*, and therefore was not devisable by him. The Statute of Wills only enables the testator to devise interests which, in default of devise, would have descended to his own heirs. Here the estate could not have descended to the heir of Sir *William*, but must have devolved on the heir of *Diana*, consequently he had no descendible interest in the estate, and therefore could not devise it. It is also to be observed, that Sir *William* could never personally have inherited this interest, for it could only take effect on his own death, and practically he could only take by surviving himself. The case bears some analogy to *Duberley v. Day* (b), in which it was held, that a husband cannot assign a reversionary interest of his wife in leaseholds which cannot by possibility vest in possession during the coverture.

They also referred to 3 & 4 *Will.* 4, c. 106, s. 2.

Mr. *Baily* and Mr. *Nalder*, for Mr. and Mrs. *Amcotts*. There is no authority to shew that Sir *William* could have devised this interest. By the old law, it was not descendible to the general heir of Sir *William*, but to the heir of *Diana*. If it was not descendible to his general heir, it was not devisable by him: both are governed by the same principle, and he could not devise away from the heir of *Diana*. The statutes 3 & 4 *Will.* 4, c. 106, and 1 *Vict.* c. 26, s. 3, rather strengthen this view; the principle is this:—that all that will pass from the testator to his heir or executor may be disposed of by his will also.

Mr.

(a) 3 *Bos. & Pul.* 643.

(b) 16 *Beav.* 33.

Mr. *Selwyn*, for *De Morlot* and wife, cited 6 *Cruise*, Digest, 4th ed. (a).

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Mr. *Longworthy*, for other parties.

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Mr. *Wickens*, for the trustees.

*Wright v. Wright* (b) and *Doe d. Calkin v. Tomkinson* (c), were also referred to.

Mr. *R. Palmer*, in reply.

The MASTER of the ROLLS reserved judgment.

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The MASTER of the ROLLS.

March 14.

This case proceeds in a great measure upon the same transactions, and relating to the same family, as the former case (d); but this case is much easier than the last, and it presents no difficulty, in my opinion, either in principle or authority.


The state of the case is this :—By a settlement made of the *Kettlethorpe* estates, on the marriage of Sir *William Ingilby* on the 10th of *November*, 1795, the *Kettlethorpe* estate was settled to Sir *William Ingilby* for life, with remainder to his first and other sons in tail male, with remainder to his daughters, as tenants in common in tail, and then with similar limitations to his sister *Elizabeth*. In default of issue by her, similar limitations in favour of his sister *Augusta*; and on failure of issue by her, similar limitations in favour of his

(a) Page 26.

(b) 1 *Ves. sen.* 410.

(c) 2 *Maule & S.* 165.

(d) *Campbell v. Ingilby*, *ante*, p. 567.


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his daughter *Diana*, and so on. In 1808, Mrs. *Buckworth*, who was possessed of two estates, called the *Harrington* and the *Fisherton* estates, left the property in this manner:—She gave it to *Augusta* in fee, with a shifting clause or an executory devise, directing that if *Augusta* should ever come into actual possession of the *Kettlethorpe* estate, thereupon her estate in the *Fisherton* and *Harrington* estates should cease, and the estate should go over to her next sister *Diana*. And she gave a similar direction if *Diana* came into possession of the *Kettlethorpe* estates, that her estates should go over to *Julia*, and in the same manner as to *Constance*. In 1841 *Diana* died without issue, and without ever having been in possession of the *Kettlethorpe* estates. The consequence was, that the executory devise, so far as she was concerned, could not take effect to deprive her of any interest, but it would become an indefeasible interest in her if it ever vested in her at all. This was an executory devise, and she left Sir *William Ingilby*, her brother, her heir at law. He died in *May*, 1854, without leaving any children surviving him, and thereupon *Elizabeth* entered into possession of the *Kettlethorpe* estates.

Upon the death of Sir *William Ingilby*, the present claimants and *Elizabeth* were his co-heirs at law, being either sisters or the issue of sisters. *Elizabeth* died on the 15th of *June*, 1854, and thereupon *Augusta* came into possession of the *Kettlethorpe* estates, and the executory devise took effect in *Diana* and her heirs, *Diana* being then dead the claimants were her heirs at law.

The question is, whether this estate passed under the will which Sir *William Ingilby* made; and I have not the slightest doubt it passed by his will. The  
 question

question is, whether Sir *William Ingilby* had power, by deed or will, to dispose of this executory interest, which was vested in *Diana*, and which had descended to him as heir at law. It is admitted in argument, that what is descendible is devisable; that a property that can descend can pass by will; but then it is said, that this was not descendible, in the sense in which that word is used as applicable to cases of this description; namely, that although it was descendible to heirs, yet it was not descendible to the heirs general of Sir *William Ingilby*, but that it was descendible, in fact, to the heirs of *Diana*, if there were a distinction between them; that the persons who would take would, in fact, take it only as the heirs of *Diana*; and, that, therefore, it was not descendible, in such a sense, as to give him the power of devising it.

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In my opinion, the word is used in this sense:—that the word “descendible” is applicable to what is the quality of the estate or interest in its inception, and that if it is descendible, then it is a descendible interest throughout the whole line of persons who take it and all the limitations; and that this was a descendible or devisable interest in *Diana* in fact is not disputed; it is settled, by a great variety of cases, and it is really not at all a matter in dispute. She died in 1841. This interest, such as it was, then passed from her to her heir at law, and, in my opinion, it passed to her heir at law exactly in the same way as it came from her. It was not affected or altered by the transmission. It was, in point of fact, a descendible and devisable interest in her, and if so, it was the same thing in him. I look at it both under the old law and under the new law; that is, how it may be varied by the Statute altering the law of inheritance, which passed in the

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third and fourth years of the reign of King William the Fourth, and how it was before that time.

It is said, undoubtedly, that if Sir William Ingill had died intestate, this interest would have passed to the heir of *Diana*, and not to the heir of Sir William Ingilby. That undoubtedly is true; but this does not, in my opinion, make any difference. By the law before the statute of inheritance, in matters which were capable of seisin, it was always traced back to the person last seised; but in estates incapable of seisin, such as remainders and reversions, it was traced back to the last purchaser, and thus it is contended, that as this interest was not descendible to the heir of Sir William Ingilby, it was not devisable by him.

It is to be observed to what this would lead. I suggested the difficulty to Mr. *Solicitor-General*, when he was arguing it before me, but met with no satisfactory answer.

This rule of descent is not confined to contingent interests, for vested interests in remainder and reversion are exactly in the same situation, and yet no one ever supposed, that a person who became entitled, by descent, to a vested interest in remainder, or to a reversion expectant upon the decease of a tenant for life, was totally unable to dispose of such interest either by deed or by will, or, in other words, was unable to grant or devise it. The argument for the Defendants has not pointed out any distinction between contingent or vested interests, nor, in fact, did their argument affect to do so, and the argument fails, unless it goes to this extent:—that if there had been a vested reversion in fee in *Diana*, expectant upon the determination of the previous

vious life estate, which had not fallen into possession during her life, and had not been disposed of by her, then, under the old law, Sir *William Ingilby*, her heir at law at her death, could not have disposed of it, either by deed or will: a doctrine which is not only directly opposed to all authority, but which is inconsistent with every principle of real property. In fact, under the old law, there really could be no question respecting it, and Mr. *Solicitor-General* admitted it to be so, and felt the difficulty very strongly. I admit that Mr. *Baily* felt, that if he admitted that, he admitted the whole case against him; and he was compelled to contend, that even under the old law, it would not have that effect. But in point of fact, this admission and this refusal to admit, in my opinion, merely shew the extreme difficulty that Counsel are under, when they are compelled to argue a case, in support of which there is so little real argument to be given.

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How does the matter stand under the new statute? The statute of the 3rd & 4th *Will.* 4, c. 106, lays down this:—the law was different on the subject, as I have already said, in those cases in which there was a seisin of property, and in those cases in which there was no seisin, and it was considered very desirable to assimilate the law on that subject, and, accordingly, the new statute has altered the law of inheritance in this respect, and has endeavoured to assimilate the law, both with regard to matters capable of seisin, and the law as applied to matters incapable of seisin. Accordingly, it enacts, that if an estate in possession descend on the heir of a purchaser, and he does not deal with it in any manner whatsoever, and then dies intestate, it will descend, not upon his heir, but upon the heir of the purchaser. That is what the statute has enacted. The recommendation of the Real Property



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Commissioners undoubtedly was, that the law should be assimilated in this way, that the heir of the last person entitled should be the person to take, but the legislature did not think fit to adopt that course, but enacted that it should always be referred to the heir of the last purchaser. The old rule undoubtedly was (and that was referred to by Mr. *Solicitor-General*) *seisina facit stipitem*; but that old rule is put an end to by the statute, because in all cases, whether there is seisin or not, it makes it go to the heir at law of the last purchaser. Therefore, in my opinion, this statute, if it has any bearing upon the case, has rather a bearing unfavourable to the Defendants, for it could not have intended to prevent a person who inherited an estate in fee simple in possession from selling or devising that estate, and yet, it is argued, that as regards interests which are incapable of seisin, it has that effect, by taking away the descendible character, and it is obvious, that if it takes away the descendible character in one case, it takes away the descendible character in the other case. The answer is, that it is a descendible estate in both cases, but that the descent is traced to the heir of the first purchaser, and not the heir of the person last seised, or the person last entitled, whether it be a matter capable of seisin, or a matter incapable of seisin.

The question therefore, in my opinion, is really disposed of. But if there were any doubts at all about it, it appears to me, that the Wills Act (a) disposes of any doubt or question upon that subject, for the third section expressly meets this particular case. It says, "it shall be lawful for every person to devise all real estate which he shall be entitled to, either at law or in equity,

(a) 1 Vict. c. 26.


equity, at the time of his death, and which if not so devised, bequeathed or disposed of, would devolve upon the heir at law or customary heir, as if he became entitled by descent of his ancestor, executor, or administrator." Therefore it exactly meets the case. It is not merely those cases which would go to his heir at law, but those to which he became entitled by the descent of his ancestor; and the latter part of the same section expressly extends the provision and the power of devising to all contingent, executory and other future interests in any real estate. I therefore consider, that this question is free from doubt, that it is settled over and over again in various modes, that the contrary cannot, on any principle of law or equity, or on any reported decision, be maintained, and that the devisees under the will of Sir *William Ingilby* must take.

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The only other question is, whether the words of Sir *William Ingilby's* will are sufficiently large to carry it; but it was not seriously argued, that they were not sufficiently large. The words are, "all his real estate whatsoever and wheresoever," which clearly would include every devisable interest which he had in real estate, and, in my opinion, this point is disposed of.

I forbear to comment upon any question as to the estate being such, in the cases that were referred to, that he himself never could have had any benefit personally of this devise, by reason of this circumstance:—that the limitation in favour of *Diana* could not take effect until after his death and the failure of his issue, because, in my opinion, though such a circumstance may sometimes be made use of in construing the meaning of a testator in a will, where he gives certain directions, yet it can have no effect whatever in qualifying or altering the interest which a man takes in law.

Consequently,

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Consequently, I am prepared to make a declaration, that the devisees of Sir *William Ingilby* took an interest in the *Harrington* and *Fisherton* estates upon the death of *Elizabeth*, when *Augusta* became entitled in possession to the *Kettlethorpe* estates.

March 19.
 April 4.

FROST v. MOULTON.

Where one of several partners agrees with a stranger for a sub-partnership, it is not to be implied, in the absence of any agreement, that the duration of the sub-partnership is to be co-extensive with the original partnership.

IN this case—

Mr. *R. Palmer* and Mr. *Roxburgh* appeared for the Plaintiff.

Mr. *Follett* and Mr. *Southgate*, for the Defendant.

Mr. *R. Palmer*, in reply.

The MASTER of the ROLLS reserved judgment.

The MASTER of the ROLLS.

April 4

A. and *B.* were partners for four years in the *K. Mill*, and *A.* and *C.* were sub-partners at will. *A.* put an end to his sub-partnership with *C.* They afterwards met and *A.* drew up this document: "Mr.

This is a suit to obtain an account of partnership transactions from the 11th of *May*, 1850, to the 20th of *November*, 1851, and also to have the benefit of an agreement of 20th *November*, 1851, by virtue of which, the Plaintiff alleges, that he either retired or was excluded from the partnership, and thereupon became entitled to 500*l.* The case depends wholly on the evidence, and, in my opinion, presents little difficulty.

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C. to receive three-sixteenths of the *K. Mill* during the present partnership of *A.* and *B.*; if Mr. *C.* enters into any other business before, to renounce his interest above-mentioned, and to receive 500*l.* as a quit claim." It was taken to a solicitor to draw a formal agreement, who said it was too vague to act upon, and both parties differed as to its construction. Held, that it was not a final concluded agreement, which could be enforced.

The Defendant and Plaintiff, before 1850, had carried on business as India rubber manufacturers at *Kingston Mills*, near *Bradford* in *Wiltshire*. The Plaintiff had no interest in the capital, but received, by parol agreement, one-fourth of the profits as a remuneration for his services. This arrangement was terminated in 1850. In *May*, 1850, the Defendant entered into a partnership by deed with three persons of the name of *Rider*, the term was expressly stated to be for four years, the Defendant took thirteen-sixteenths and the *Riders* three-sixteenths of the profits. When this had been concluded, the Plaintiff and Defendant agreed, by parol, that the Plaintiff should become a partner with the Defendant in his shares in this way :—that Plaintiff was to have no interest in the capital, but that he was to have three of the Defendant's thirteen-sixteenths of the profits.

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The first question is, how long this sub-partnership was to last. [*His Honor here read the Plaintiff's evidence.*] The Plaintiff now contends, that, in the absence of any stipulation as to time, the agreement between him and Defendant must be taken, either by operation of law or by necessary implication, to last the exact time of the partnership with the *Riders*. It is difficult, however, to understand how, in the face of the Plaintiff's evidence I have read, he can maintain this claim. The evidence seems pointedly to exclude his claim being put on the ground of any agreement, either expressed or understood, between himself and the Defendant. It is obvious that this claim is wholly incapable of being supported. The law has no operation or effect on such a matter, except as it is the subject of contract; the agreement, whatever it was, and that alone, binds the parties. It might possibly, in many cases, be inferred, as a matter of evidence, that in a

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case where one of two partners makes a sub-partnership with a third person in his share of the profits, the sub-partnership is to be co-extensive with the original partnership, although, unless the power of introducing a fresh partner was stipulated for, by some express clause in the partnership articles, or sanctioned by the other of the two original partners, it would be difficult to see how he could be bound. But this sanction, I assume, was obtained in the present case. Still such an implied duration of the partnership must be by mutual understanding between the partners; the mere fact that the subject matter of the partnership has a particular duration, does not, as a matter of course, create that implication in the absence of any agreement, express or implied. This is laid down in *Crawshay v. Maule* (a), and many other cases.

The only question here is, was this period of four years understood, by both Plaintiff and Defendant, to be the period of the partnership between them? Both Plaintiff and Defendant positively swear that the time was not limited; the duration of the partnership cannot be both limited and unlimited. If it be contended, that the difficulty is to be surmounted by saying, that it was to last four years at least, and as much longer as they pleased, that is limiting the partnership to four years, beyond that time it is nothing, it merely depends on the will of the parties. The further duration, at the option of the parties, always exists in the case of a partnership, the duration of which is limited to a fixed period. Here it is expressly sworn, on both sides, that it was not limited. It is impossible, therefore, to admit the argument, that, in spite of this evidence on both sides, the partnership was to last at least four years.

This being the state of things on the 14th November,  
1851,

(a) 1 Swanst. 495.

1851, the Defendant writes to the Plaintiff to put an end to the arrangement; thereupon a meeting takes place between them: and the next question is, whether any agreement was then come to between them, of which this Court can now give the Plaintiff the benefit.

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The Plaintiff and Defendant met on the 20th *November*, 1851; the Defendant wrote a memorandum, which is Exhibit (G.), and gave it to the Plaintiff to take it to Mr. *Bush*, the solicitor of the firm, to draw up in the shape of a formal agreement. Mr. *Bush* said it was too vague to act upon, and that he must see the Defendant and obtain instructions from him. He does so, and prepares another and distinct document, which the Plaintiff objects to. Nothing is signed, and in *December*, 1851, the Plaintiff is excluded from the partnership. The question here is, does Exhibit (G.) constitute a binding agreement on both parties, which this Court can enforce or give the Plaintiff the benefit of.

It is in these words:—"Mr. *Frost* to receive three-sixteenths of the Kingston Mill, during the present partnership of S. M. and Company. If Mr. *Frost* enters into any other business before, to renounce his interest above mentioned, and to receive 500*l.* as a quit claim." Was this an agreement buying the departure of the Plaintiff from the existing partnership, or was it a new agreement about to be entered into, as to the terms on which the Plaintiff was to continue or become a partner in the then existing concern?

I am of opinion, both from the contents of the document itself, and from the evidence of the parties, that it was not the former, that is, an agreement by which the Plaintiff was to be bought out. The Plaintiff had no right or power to continue in the concern, and his
quitting

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quitting it was not a matter which it was necessary to purchase. It formed no consideration, and the Defendant distinctly swears, that he never withdrew his claim and assertion of right to dismiss the Plaintiff from the partnership. Neither is it put by the Plaintiff, in his evidence, as a mode of purchasing his absence; he treats it as a new agreement regulating his mode of continuing in the partnership, and superseding the old one.

Looking at it in the latter point of view, viz., as an agreement as to the mode in which the Plaintiff should continue or become a partner, the former agreement being superseded, the question is, was it a concluded agreement, or was it a mere basis for the purpose of discussing the terms of an agreement to be entered into? The document itself is ambiguous; the Plaintiff and Defendant disagree as to the construction to be put on it, and their meaning when it was entered into; the words, "other business," are said by the Defendant to mean any business other than that of manufacturing India rubber. The Plaintiff says, it means any business other than that carried on at the *Kingston Mills*. On the evidence, I think that it was not a concluded agreement, but that it was nothing more than terms agreed on between the Plaintiff and Defendant, as a basis on which to settle the terms of an agreement, which was thereafter to be settled; but which, in consequence of disagreement, has never been settled. It was nothing more than a settlement of the footing on which they were to treat.

The Plaintiff's account of it is this:—he says, our differences were so far modified as to lead to terms, which were reduced into writing. It was not signed, it does not seem by either party to have been treated, at
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the time, as anything concluded. The Plaintiff says, he took it to Mr. *Bush* as instructions for an agreement. The Defendant, in his evidence, states, that he made a proposal, which, he says, was accepted by the Plaintiff. If the case were, that the Plaintiff had accepted the agreement, according to the Defendant's construction, and came now for the performance of it, I should have held him entitled to it, and the Defendant bound ; but the Plaintiff at the time repudiated, and still repudiates, the agreement, according to the construction put upon it by the Defendant ; and it is but proper to observe, that, according to the construction which the Plaintiff puts on it, and if I am right in my opinion that the first agreement was not limited as to duration, the agreement was without consideration, and merely gave the Plaintiff a right to receive 500*l.* at any time he pleased, without giving anything whatever in return for it.

The document was no sooner written, than differences arose, between the Plaintiff and Defendant, as to the terms of the agreement to be come to between them and as to the construction of the Exhibit (G.); and these differences have prevented any agreement from being drawn up and signed between them. All this, in my opinion, shews, that (G.) was not a binding or concluding contract, and that no concluded agreement was come to between them. The difference on this subject appears to have existed from the beginning, the Defendant throughout asserting, that he did not mean what the Plaintiff says he did, and treating it merely as proposals. It was so treated throughout by Mr. *Bush*, the solicitor applied to. Besides this, it is old matter, for the contest arose immediately after the month of *November*, 1851, and continued until the present time ; and the only question now is, if Mr. *Bush* had prepared a
 formal

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formal agreement in accordance with the Plaintiff's construction of Exhibit (G.), and if the Defendant had refused to execute it, and had insisted that he had entered into no such agreement, could I compel him now to execute and perform it? I am of opinion that I could not.

I am of opinion, therefore, that the Plaintiff is entitled to the relief asked in the first part of the prayer of his bill, viz., the account of the partnership transactions from the 11th of *May*, 1850, up to the end of *November*, 1851, but that he is not entitled to the sum of 500*l.*, which he insists upon, on the assumption that the Exhibit (G.), the memorandum written by the Defendant, was a concluded agreement, to be construed according to the Plaintiff's interpretation; and, as the Defendant swears, that he has always been ready to account for the profits up to the 14th of *November*, 1851, which is not contradicted, and as the remaining space of sixteen days, from 14th *November* to 30th *November*, has not been the occasion of this suit, I must direct the Plaintiff to pay the costs of the suit up to and including the hearing, but not the subsequent costs.

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BLAKE v. MOWATT.

**M**R. *R. Palmer*, Mr. *Selwyn* and Mr. *Erskine*, for the Plaintiff.

The Solicitor-General (Sir *R. Bethell*), Mr. *Lloyd*, Mr. *Cairns* and Mr. *Cottrell*, for the Defendant.

Mr. *R. Palmer*, in reply, referred to *Evans v. Bicknell* (a); *Gillett v. Peppercorne* (b).

The MASTER of the ROLLS reserved judgment.

5. *The MASTER of the ROLLS.*

This is a suit instituted for the purpose of setting aside the transfer of one hundred shares in a railway company, called, "The *Portsmouth Railway Company*," intended to connect *Godalming* with *Portsmouth*, taken by and transferred to the Plaintiff, and which shares belonged, at the time of the transaction, to the Defendant.

The project was set on foot in 1852. The Plaintiff and Defendant were both directors of the company, the Plaintiff had subscribed for 250, the Defendant for 1,000, and he had, in addition, bought 1,000 scrip certificates in the market, and was also the chairman of the company. On the 8th *July*, 1853, the act passed establishing the company, and authorizing the formation

*Jan. 23, 25, 26, 29.*

*April 5.*

The Plaintiff and Defendant were directors in a railway company. The Plaintiff was desirous of obtaining 1,000 "unalloated" shares, in order to promote its success. The Defendant clandestinely caused 1,000 of his own "allotted" shares to be transferred to the Plaintiff. The transaction took place in *July*, 1853, but was discovered in *June*, 1854, and the bill was filed in *November* following. The Court held, that the transaction was void, and set it aside, and that there had been no laches.

(a) 6 *Ves.* 174.

(b) 3 *Beav.* 78.

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tion of the railway. A week previously, viz., on the 1st of *July*, 1853, when the passing of the Act was certain, a committee of three directors was appointed to endeavour to place the unallotted shares. The directors who composed this committee were, the Plaintiff, the Defendant and Mr. *Carter*. The first meeting of this committee took place the day after the passing of the Act, but Mr. *Carter* did not attend it, the only persons present were the Plaintiff and the Defendant, and Mr. *Roy*, the secretary of the company.

The result of this case depends on what took place on that day at and subsequent to the meeting. The Plaintiff alleges, that for the sake of benefiting the company, and to dispose of unallotted shares, he consented to take 1,000 more of such unallotted shares, provided he was allowed a month or six weeks to enable him to dispose of them amongst his friends, and before he should be called upon for the payment of any deposit in respect of them. The fact is, that no unallotted shares were given to the Plaintiff, but 1,000 of the shares of the Defendant, either already allotted to him, or which had been allotted to others and purchased by him in the market, were transferred to the Plaintiff. The Plaintiff says, that this fact was unknown to him; that it was concealed from him by the Defendant, and that if the fact had been known to him, he would not have taken any of such shares.

The Defendant, on the other hand, contends, that the Plaintiff wished to buy shares, and that although the fact that the shares he bought were the property of the Defendant was concealed from him, yet that this was immaterial, inasmuch as one set of shares was as good as another.

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The first thing to be ascertained is what took place on the 9th of *July*, 1853. [*The MASTER of the ROLLS here read the account given of it.*]

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The Plaintiff agreed to take the 1,000 additional shares, and on the 21st of *July*, 1853, he gave a cheque, dated the 21st of *August*, 1853, for the sum of 2,100*l.*, the deposit upon them, to Mr. *Roy*, who paid that cheque into the bankers of the company, viz., the *London and Westminster Bank*, who were also his own bankers, to his own credit; and on the following day, the 22nd of *July*, 1853, he gave a cheque, dated the 22nd of *August*, 1853, for the same amount to the Defendant, who paid that cheque into his own bankers.

The Defendant first contests the fact alleged by the Plaintiff in the manner I have already stated. He contends next, that, if the fact be so, the Plaintiff has sustained no injury, because one set of 1,000 shares is as good as another, and that, at all events, he intended to increase his stake in the concern to that extent. If he fails in this contention, he contends, that the Plaintiff is barred by acquiescence and laches, and in support thereof, he contends, that what took place at the subsequent meeting of the board of directors, and also his possession of the scrip certificates, must have revealed to him the fact, that the shares transferred to him were not unallotted shares, and that in a matter varying so much in value, from day to day, as railway shares, it was incumbent on the Plaintiff to bring forward his claim at the earliest moment.

On the first point, as to the question of fact, I have come to the conclusion, after a perusal of the whole evidence, that the only offer made by the Plaintiff was to take *unallotted* shares, and that the Defendant substituted

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tuted his own shares in the place of unallotted shares, without the knowledge and contrary to the belief of the Plaintiff.

The reasons for the conclusion which I have drawn from the evidence before me, on this part of the case, are to be found in the following circumstances, which are established in evidence. In the first place, it is clearly shewn that it was considered by the directors to be a matter of great importance for the success of the undertaking, to induce the public to entertain a favourable opinion of it, and, for this purpose, to be able to announce to the public, in the report to be made on the occasion of the first general meeting to be held after the passing of the Act, that all the shares had been allotted. This meeting was to be held on the 29th of *July*, 1853. A committee of three directors was formed for the purpose of placing the shares, and of enabling the company to make the desired announcement. The Defendant was a member of this committee, and his letter to Mr. *Roy*, on the 19th *July*, 1853, speaks of the great importance of accomplishing this object, and shews the value he attached to it. The evidence also shews, that the directors resorted to various expedients to enable them to make the qualified announcement which is contained in the general report.

It is impossible to read the account of the proceedings of the directors, without seeing, that it was considered, as I have no doubt the fact was, that it would have been beneficial to the undertaking, if they could have announced, at that meeting, that every share had been allotted, and the deposits paid on each of them.

I see then a strong motive, on the part of the Plaintiff,

tiff, to subscribe for and take unallotted shares, in order to assist the object of the company, and the purpose for which the committee had been appointed. I find that the evidence of all three, viz., of the Plaintiff, of the Defendant, and of Mr. *Roy*, concurs in the fact, that the Plaintiff proposed or consented to take 1,000 unallotted shares conditionally, and I find every reason for accepting, and a total absence of any motive or reason for rejecting that offer. That offer must either have been rejected, or not rejected. Assuming it to have been rejected, I look for any evidence to shew that the Plaintiff wished to buy additional shares already allotted. I find a total absence of any such evidence, there is not a trace of any application by the Plaintiff to *Roy* or to any other person for any such purpose; there is not a trace of any proposal by Mr. *Roy* to the Plaintiff to sell him shares; Mr. *Roy* was not a holder of shares to that amount; it is not suggested, that the Plaintiff bought 1,000 shares from Mr. *Roy*, believing them to have been his shares. On the assumption that the Plaintiff's offer was rejected, no suggestion is offered to explain when or how the first proposal to sell by *Roy* or to buy by Plaintiff was made. There is a total absence of inquiry by the Plaintiff as to whose shares they were, how *Roy* came to be commissioned to sell them, and why the holder wished to part with them. In a new undertaking, in the success of which the Plaintiff was so much interested, and which so much depended on the favour and good opinion of the public, it is reasonable to believe, that the Plaintiff would have done something, and made some inquiry on this subject, before purchasing so many as 1,000 additional shares, in a manner which could not influence the price in the market.

That his mind was pointedly alive to this subject

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is shewn by the subsequent correspondence between himself and the Defendant, in the following year. If he had made any such inquiries, it would be scarcely possible, that no trace of it should be found, in the documents and correspondence in evidence relative to the matter. The mode in which the Plaintiff's conditional offer is said to have been rejected, is highly improbable; it is done as if it was obvious that it could not be seriously entertained, and yet it was one, which, judging from their conduct towards other shareholders, the directors would have been most happy to obtain. I doubt whether the Defendant would have refused, or had authority to refuse, such an offer without the sanction of the board. I believe that it was not rejected. If it was not rejected, the offer was either accepted or passed over without rejection or acceptance. I consider it in either branch of the alternative. It is, as I have already stated, shewn, that the undertaking would have benefited by the Plaintiff's taking unallotted shares, and that his object was to advance the success of the undertaking. If the Plaintiff's offer was accepted, there is an end of the case. I take then the other branch of the alternative, and I look at the evidence of the facts, on the assumption that the offer was passed over in silence and without rejection. It is clear, in that case, that the Plaintiff must have believed, that his offer was accepted, and that he was taking unallotted shares, and then the whole matter and the acts of all parties are reconcileable, probable and consistent. I see nothing to rebut the conclusion, that the Plaintiff entertained this belief. It is admitted by the Defendant, both in his evidence and in his letters, that the fact that the shares taken by the Plaintiff were the property of the Defendant was concealed from the Plaintiff: nay this was so even in the correspondence between the Defendant and the Plaintiff at the close of the year 1853. When the Defendant

Defendant states his desire to get rid of some of his shares, he speaks of them as if the shares he had bought in the market at a premium were still his, and were those which he was desirous of disposing of, although the fact was otherwise: the letters also of the Defendant to the Plaintiff, in *November*, 1853, and *February*, 1854, shew, that he kept up that belief in the mind of the Plaintiff, and the letters of the Plaintiff in answer shew, that he was still under the delusion that those shares were still held by the Defendant, and that information of his intention to part with them alarmed him. This belief of the Plaintiff is also established and confirmed by many other circumstances which are given in evidence amongst them.

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I have therefore come to these conclusions:—First, that the Plaintiff proposed to take 1,000 *unallotted* shares. Secondly, that that proposal was not rejected. Thirdly, that the Plaintiff believed it to have been accepted, and that he acted on the faith and in the belief that it was accepted.

The next and most important proposition, so far as the Defendant is concerned, is this:—was the Defendant aware of all this, and did he endeavour to substitute his shares in the place of those which were to be allotted to the Plaintiff. That the Defendant knew the three matters I have already stated is, in my opinion, proved beyond doubt, and follows from the evidence I have referred to, which establish the first two conclusions, viz., that the offer was made by the Plaintiff, and that it was not rejected. The question then resolves itself into this:—did the Defendant take advantage of that offer, to substitute his own shares for the shares which the Plaintiff had offered to take? The Defendant's case is this:—that seeing that all the shares would



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be placed, he asked Mr. *Roy* to assist him in getting rid of his 1,000 shares, that Mr. *Roy* told him that he could, as he knew that the Plaintiff wanted to buy shares.

This appears to me to establish the substance of the Plaintiff's case. Why did he interpose Mr. *Roy* for this purpose, unless he believed that the Plaintiff would not be induced to take any shares other than new shares to be allotted? If the Plaintiff was to be a purchaser (to use the argument of the Defendant himself), one set of shares was as good as another. The Defendant and Plaintiff were personal friends, and apparently on terms of familiar intercourse. If Plaintiff bought allotted shares, and merely wished to increase his stake in the company, it would probably be no objection to him, that at the same time he obliged a friend. I am at a loss, therefore, to find a motive for interposing Mr. *Roy* as an intermediate purchaser, unless on the ground and for the purpose of concealing the matter from the Plaintiff, or any motive for concealing the transaction from the Plaintiff, unless on the assumption that they knew the Plaintiff believed that he was taking unallotted shares. This is confirmed by the correspondence. [*His Honor referred to it.*]

In my opinion, therefore, upon the statement and evidence given by the Defendant himself, irrespective of Mr. *Roy's* evidence, it is established, that the Defendant knew that the Plaintiff believed that his offer to take 1,000 unallotted shares on certain terms was being carried into effect; and that he also knew that Mr. *Roy* was transferring to the Plaintiff and without his knowledge 1,000 shares which had been bought by and belonged to the Defendant. Did the Defendant believe, that the Plaintiff wished to acquire 2,000 additional shares;

shares ; that is, that he was about to buy 1,000 shares in addition to the 1,000 shares which he had applied to have allotted to him? Obviously he did not. What could he then believe, but that his own shares were to be substituted for the shares for which the Plaintiff had applied, and which he expected to receive.

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It is stated, that the shares were then at a premium in the market, and that the Defendant might, if he pleased, have obtained that benefit by a sale in the ordinary manner ; but I do not believe that this was possible. It is justly observed, with regard to another part of this case, that the value of such matters as railway shares is very fluctuating, and easily affected by slight circumstances ; the nominal price of shares is often very different from that for which they could actually be sold, and few things could be considered more likely to depreciate, in public estimation, the shares of an undertaking, in its inception, than the fact that the chairman of the board of directors should sell 1,000 shares immediately after the Act had been obtained.

It is then contended, that, in truth, the Plaintiff has sustained no wrong, and that, therefore, he is entitled to no relief ; that his proposal was to take 1,000 shares at *par*, that he got 1,000 shares at *par*, and that it matters nothing to him whether the shares are numbered by one set of figures or by another. The observations I have already made have, by anticipation, disposed of this objection. The object of the Plaintiff was to benefit and advance the undertaking, by getting all the shares allotted ; the value of this I am unable fully to estimate, but the evidence proves, that the directors and the Plaintiff, and particularly the Defendant, considered this to be a matter of great moment. What benefited and advanced the undertaking

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ing conferred a benefit on all the shareholders, and particularly on the directors, and on one like the Plaintiff, who for this purpose had consented to embark so largely in the undertaking.

The Plaintiff was one of the committee appointed to further this object, in order to accomplish it, he agrees to take 1,000 additional shares. It cannot be reasonably urged by the Defendant, who was also a member of that committee, and who then urged the importance of it, now to say that this object was a matter of indifference, that it could not have benefited the Plaintiff, and that he cannot complain that, when he thought he was accomplishing or furthering this object, he was only assisting another shareholder to diminish the amount of his risk in the concern, by leaving the undertaking as it stood, and merely transferring so much interest in the concern from one person to another.

In my opinion, therefore, if this matter had been discovered and complained of immediately after the transaction had occurred, this Court would have held, that the substitution of the Defendant's shares for those intended to be taken by the Plaintiff was void, and that the transaction must be set aside.

But it is alleged, that the Plaintiff must have discovered this, or must be taken to have discovered this whole matter shortly afterwards, and that as he did not file his bill till the 4th of *November*, 1854, he must be taken to have acquiesced, or, if not, that his delay in such a matter as railway shares, and his taking the chances of a rise in the market, have bound him from obtaining any relief from this Court. This is a most important consideration. I fully concur in the conclusion,

sion, if the facts which lead to it be established. [*His Honor here referred to the alleged acts of acquiescence, and the evidence in support of it.*]

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It is, I think, made out by the evidence, that the Plaintiff did not examine or compare the scrip certificates in question, until the beginning of *June*, 1854. I feel myself bound to say, that, on thee vidence, I believe that in *June*, 1854, the Plaintiff first discovered what had been the real transaction in *July*, 1853.

On the 30th *June*, he writes to the Defendant to complain of the transaction, and to insist on its invalidity. From that time there has been no laches, although some correspondence took place, and an attempt to induce the board of directors to interfere in the matter, which they manifestly had no power to do, and the bill is filed on the 4th *November*, following. I am of opinion, therefore, that what occurred since *July*, 1853, and previously to the filing of the bill, has not debarred the Plaintiff from obtaining the relief to which he was entitled, arising out of the original transaction itself, or destroyed his right to contest, and to set it aside.

It is urged, that I ought not to do so, because I cannot replace the parties in the situation in which they stood at the time; that the Defendant might have disposed of these shares in a manner which the subsequent fall of their prices will not now permit him to do. It is no doubt true, that, in this respect, it falls heavily on the Defendant, but all this ought to have been considered by him before. It is the leading principle of the Equity administration in this Court, that truth shall govern all transactions, and that one who deludes another in a contract, or permits him to be deluded, and takes advantage

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advantage of that delusion, cannot afterwards complain, that, if the contract be set aside, he will be in a worse situation than if the contract had never been entered into. Here the Plaintiff intended to enter into no contract, but he intended to do a particular act by which he was to advance an undertaking in which they were mutually interested : the Defendant takes advantage of the knowledge he possesses of the intention of the Plaintiff to defeat the particular act whereby the Plaintiff sought to accomplish his object, and to substitute, in the place of it, a mode of disposing of a portion of his own interest in that undertaking. In my opinion, that cannot be permitted : the substitution could only be made upon the fullest communication with the Plaintiff, and ample notice to him of what the Defendant intended and desired to do.

I am compelled to declare, that the transaction was void, and that no valid transfer of the shares took place to the Plaintiff, but that the Defendant must be declared to be the owner of these shares in equity, from the beginning, and be compelled to do all acts necessary for making himself the legal owner of them, in the place of the Plaintiff, and that accordingly a decree must be made in the terms of the prayer of the bill.

The costs must follow the event.

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BROWN v. BUTTER.

THIS was a motion made by one of several Defendants to dismiss the bill for want of prosecution. The bill was filed in *March*, 1855, and all the Defendants having answered, the Plaintiff amended his bill, requiring answers from two of the Defendants, but not from the third. After fourteen days had expired,

Mr. *Jessell* moved, on behalf of the third, to dismiss the bill for want of prosecution.

Mr. *Southgate*, *contra*.


The MASTER of the ROLLS reserved judgment.

*April 4, 10.*  
The Plaintiff required *A.*, but not *B.*, to answer the amendments, *B.*, who did not desire to answer, moved after fourteen days to dismiss. Held, that the case was not within the 115th Order of *May*, 1845.

The MASTER of the ROLLS.

*April 10.*

This is a case of practice, and the question is as to the right of the Defendant, under the circumstances which have occurred, to dismiss for want of prosecution. The case may be stated to be to this effect: the Plaintiff files an original bill against three Defendants, who all answer, the Plaintiff then amends his bill, and requires an answer from two of the Defendants, but none from the third. More than a fortnight having elapsed, the third Defendant, who himself does not desire to answer, moves to dismiss the bill for want of prosecution, and claims the benefit of the 115th Order of the 8th of *May*, 1845,

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1845 (a). That Order is to this effect:—"Where the Plaintiff has, after answer, amended his bill, without requiring an answer to the amendments, any Defendant may" move to dismiss if the Plaintiff does not file a replication, &c.:—

"1. Within fourteen days after service of notice of the amendment of the bill, in cases where the Defendant does not desire to answer the amendments.

"2. Within fourteen days after the Master's refusal to allow further time, in cases where the Defendant desires to answer.

"3. Within fourteen days after the filing of the answer, in cases where the Defendant has put in an answer to the amendment."

The Order specifies fourteen days, if the Defendant is not desirous of answering, and specifies fourteen days after the answer in cases where the Defendant has answered.

I am of opinion that this Order is only applicable where no answer at all is required from any of the Defendants. If it were not so, the words of the Order must be materially varied. They are "without requiring an answer to the amendments."

If the Order were not treated as applicable to a case where the Plaintiff requires no answer to the amendments, the words would apply to a Defendant from whom an answer is required, which would be impossible, because the Defendant required to answer might say, "I do not desire to answer the amendments," and, under the

(a) *Ordines Can.* 331.

the 115th Order, s. 1, "I will move to dismiss your bill in a fortnight, though you require an answer to it." It is impossible to treat it so, for it is plain the effect would be, that when the Plaintiff required an answer from some of the Defendants, he would be compelled to insist upon having an answer from all the Defendants, because unless he did so, he would be liable to have his bill dismissed for want of prosecution at the end of a fortnight. I am, therefore, clear that this Order does not apply to this case.

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On the other hand, the Defendant alleges, that if this Order does not apply, there is no Order which enables him to move to dismiss the Plaintiff's bill for want of prosecution, and that a Plaintiff might, by collusion with a friendly Defendant, keep a suit hanging over the heads of the other Defendants for any length of time. There is great force in this; I admit I do not find any other Order which enables him to move to dismiss. On application to the other branches of the Court I do not find that the Court has ever decided this case, but having regard to the analogy to be drawn from the rest of the practice of the Court, I am of opinion that what the Court must do in such a case is, to allow the Defendant, after a reasonable time has elapsed, to move to dismiss, if the Plaintiff has not taken proper steps to get in the answers of the other Defendants. I admit the difficulty which that imposes on the other Defendant, for he is ignorant whether answers are required from the other Defendants, all that he knows is, that no answer is required from him, and, therefore, he must act in every case as if the Plaintiff required an answer from some one of the other Defendants. It may be, that the new practice does not, in this respect, exactly fit on to the old, and that some new Order may be required for the purpose



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purpose of setting this right. As I understand the new practice, the Defendant is ignorant whether an answer is required or not from the other Defendants, and it therefore might be useful to state, on the face of the bill, from whom an answer is required. I have no doubt that this Order does not allow this Defendant to move to dismiss at the end of a fortnight, which would not give sufficient time to the other Defendants to answer the amended bill.

I have consulted the other branches of the Court, and think that probably some Order may be made or rule laid down to meet cases of this description. I am satisfied that I should do great injustice in this case if I dismissed the bill for want of prosecution, and I must refuse the motion without costs. I cannot explain to the Defendant at what time he can probably come to dismiss, but there must be some analogy, in practice, to the other cases.

I am of opinion, that the 115th Order does not apply to a case where one out of several Defendants is not required to answer the amendments.

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1856.

COWELL *v.* CHAMBERS.

*April 16.*

**T**HIS case came on upon a petition presented on the death of Mr. *Chambers*, a prior tenant for life, praying for the payment to Miss *Gulston*, the present tenant for life, of the income of the property.

Recital of the death of a prior tenant for life in a private act of parliament,  
Held, upon an application by a subsequent tenant for life for payment of the income, to be insufficient evidence of the death.

As evidence of the fact of the death of some persons who, if living, would be tenants for life in priority to the Petitioner, a private Act of Parliament, passed sixteen years ago, to enable the trustees to grant mining leases, was produced, and in which act the fact was recited.

Mr. *T. H. Terrell* in support of the petition.

Mr. *Berkeley* for the Respondent.

*The MASTER of the ROLLS* thought that this was not sufficient, and that the usual evidence of death, by certificate and proof of identity, must be produced.

1856.

April 24.

## GIBSON v. WILLS.

Where the entire adverse interest is unrepresented by any party to the suit, the Court will not appoint a person to represent that interest, under 15 & 16 Vict. c. 86, s. 44.

The question was between the children who survived and those who pre-deceased their parents. There had been two of the latter, but neither of their estates were represented in the suit. It was asked, under the 15 & 16 Vict. c. 86, s. 44, that the surviving husband of one might represent the interests of the absent parties. The application was refused.

UNDER a marriage settlement, a question arose between the children who survived their parents and those who died in their lifetime. All the surviving children were parties to the cause, but no representation had been taken out to two deceased daughters. One of them had died unmarried, and the other had died leaving a husband surviving her.

Mr. W. Forster asked that the husband might be appointed, under the 15 & 16 Vict. c. 86, s. 44, to represent the two deceased daughters. He cited *Swallow v. Binns* (a); *The Dean of Ely v. Edwards* (b).

*The MASTER of the ROLLS.*

This does not appear to be a case within the statute. It is clear that there is a hostile question for discussion, and no representation having been taken out to either of the deceased daughters, the Plaintiffs ask the Court to appoint a nominee of their own to represent their adversaries. If appointed, he may make a feeble defence, and a decree may be obtained which will be binding on those absent. The object of the statute was this :—where you have real litigating parties before the Court, but it happens that one of the class interested is not represented, then, if the Court sees that there are other persons present who *bonâ fide* represent the interest of those absent, it may allow that interest to be represented ; but it will not allow the whole adverse interest to be represented.

I can go to this extent :—if you get *bonâ fide* representation to the other sister, I can allow the husband to represent his deceased wife's interest.

(a) 9 Hare, App. 47.

(b) 17 Jur. 219.

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DEAN v. THWAITE.

April 30.  
May 1, 2.

THE Plaintiff's estate adjoined that of the Defendant. The Defendant's husband, prior to his death in 1851, and the Defendant subsequently, had, in working their own collieries, passed into and worked the Plaintiff's coal, and this, it was alleged, had been done from 1840. The Plaintiff filed the bill against Mrs. *Thwaite* and the representatives of her husband, for an account of the coal thus improperly taken, and for payment of the value, and for an injunction.

Where, by underground working, the Defendant had taken the coal of his neighbour, the Court limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the *onus* of proof would lie on the wrongdoer to shew that it was not taken within the six years.

Mr. *R. Palmer* and Mr. *Cairns* for the Plaintiff, asked for a general account, contending that the Statute of Limitations did not apply to the case of a concealed fraud, and that time only run from the discovery of the wrong. They cited *Brooksbank v. Smith (a)*; *South Sea Company v. Wymondsell (b)*; *Hovenden v. Lord Annesley (c)*; *Booth v. Earl of Warrington (d)*; *Blair v. Bromley (e)*.

*Semble*, the account would not be so limited, if the coal had been abstracted intentionally, and steps had been taken to conceal the fact and prevent discovery.

Mr. *Lloyd* and Mr. *Prendergast*, for the Defendant, contended, that in no case had it been decided, that the concealment of a trespass was a ground for holding that the Statute of Limitations did not apply. They said that the 26th section of the 3 & 4 *Will. 4*, c. 27, shewed the view taken by the legislature on this subject.

*The*

(a) 2 *Y. & Col. (Exch.)* 58.

(b) 3 *P. Wms.* 143.

(c) 2 *Sch. & Lef* 629, 630.

(d) 4 *Bro. P. C. (Tom. ed.)* 163.

(e) 5 *Hare*, 547.

in a case of this description.  
of proof lies upon the wrongd  
has not been taken from the  
the time during which this (C  
countable for it. It was imp  
ascertain that fact, it was so  
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I think that the Plaintiff  
an account of the coal which  
ground, subject to the questio  
tions, upon which I should w

*Mr. R. Palmer* was heard  
account ought to be carried t

*The MASTER of the ROLLs*

I will state my opinion to-  
opinion that the account sho  
before the filing of the bill,  
pression, the course I shoul  
should direct some compete  
amount of coal which has bee  
land, and then require the D  
has not been taken within th

an account ought to be directed, but that it must be confined to the coal gotten within six years before the filing of the bill.

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The case of fraud alleged, and the only fraud that I think would justify the Court in coming to the conclusion that the coal gotten before that period ought to be accounted for, is, that the Defendants had intentionally taken the Plaintiff's coal, and had concealed the fact, and during the process had taken steps to prevent the Plaintiff discovering it. Undoubtedly that is alleged, and there is some evidence which leads to that presumption, but it is not conclusive nor is it supported by any documentary evidence, and it is met by counter evidence, at least by the positive denial on the part of the Defendant herself. In a case of fraud I should require distinct and clear proof against persons liable to be made answerable for the consequences of it.

There are, besides, some indications on the evidence, which weigh with me on this question, that the Plaintiff was put upon inquiry, and that various circumstances existed which might have led him to take proceedings at an earlier period than he actually did, for the purpose of ascertaining the state of the works below the surface of the earth, and whether they trenched on his property. I am of opinion, therefore, that in this case, the account must be confined to six years before the filing of the bill.

The way I intend to deal with the account is this :— I shall see if the parties themselves can agree as to the amount and extent of those workings. If they cannot, then I shall probably appoint, under the powers entrusted to me by the Act of Parliament (which I think extends to cases of this description), some coal agent, who is

1,000 tons, has been taken  
Defendant to shew what part  
taken prior to the six years

I think the burden of proof is on the  
defendant, for this reason:—  
which I have frequently  
of the chimney sweep who  
*Armory v. Delamirie* (a), a  
which I have constantly ac-  
be taken most strongly against  
and destroys evidence. I  
son whose duty it was to  
workings there were in order  
charge a person working the  
land with the full amount  
was not taken within the  
directs the account. On  
certainly not treat this as a  
on any reasonable evidence  
what time the coal was  
taken with respect to the  
the coal worked.

(a) 1 *Strange*, 505; 1

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ATTORNEY-GENERAL *v.* The Corporation of  
GREAT YARMOUTH.

March 1, 2, 5.

THIS information was filed by the *Attorney-General* against the Corporation of *Great Yarmouth*, the Town Councillors who were the committee for granting leases, and a Mr. *Moore*. It prayed an injunction to restrain the Corporation from granting a lease, of a small property belonging to the Corporation, to the Defendant Mr. *Moore*, for twenty-one years, at a rent of 6*s.* 3*d.*, with a fine of 7*s.* 6*d.*, on the ground of its not being authorized by the Municipal Corporation Act. The value of the property was stated to be 5*l.* per annum.

The 95th section of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), which enables municipal corporations to re-new leases on a fine, in cases where sanctioned "by ancient usage or by custom or practice," at "a fine certain," or where they "have ordinarily made renewal" upon "an arbitrary fine," is to be construed liberally.

The Municipal Corporation Act (5 & 6 Will. 4, c. 76, s. 94) prohibits a corporation granting leases of the corporate property, for any term exceeding thirty-one years, except in the cases mentioned in the 95th section, and requires them to reserve "such clear yearly rent as to the Council shall appear reasonable, without taking any fine for the same."


The word "renewal," in the Municipal Corporation Act, does not mean a mere custom to let on lease at different rents, and though the renewals need not be on precisely the same terms,

The 95th section provides, "that in all cases in which any body corporate shall, on the 5th day of *June* in this present year [1835] have been bound or engaged, by any covenant or agreement, express or implied, or have been enjoined by any deed, will or other document,

there must be such an uniformity as to shew that the same lease has been renewed.

Leases were granted by a municipal corporation of the same property in 1778, 1798 and 1824, to the same lessee and his assigns, for twenty-one years, at a rent of 5*s.* In the two last instances alone a fine of 7*s.* 6*d.* had been taken. The covenants varied, and there was an interval of six years between the second and third, during which there was a yearly tenancy. Held, that the case did not come within the 95th section of the Municipal Corporation Act, and that a renewal could not be granted at an under value and on a fine.





any life or lives and years, determined of any number of years, *at a special or specific terms or cases* in which any body corporate *ordinarily made* renewal of a life or lives or for years, determined lives, at any fixed or determined period, or after the lapse or upon the dropping of any *ment of an arbitrary fine*, it Council of such borough to term or number of years, eliminable with any life or lives, and at such rent, and upon the premium, either certain or at out any covenant for the future body corporate could or might Act had not been passed."

It appeared, in this case, that 8th of *May*, 1778, the Corporation demised the property in question one years from the *Michaelmas*. No fine was taken, and the lease passed on any assignment with

the former lease for twenty-one years, to take effect from the expiration of the former lease (*Michaelmas*, 1797), at a rent of 5*s.* and for a fine of 7*s.* 6*d.* This lease contained a power of re-entry if the lessee assigned without leave, and a covenant not to build.

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This lease expired on *Michaelmas*, 1818, and the lessee remained tenant from year to year until 1824.

On the 17th of *February*, 1824, a third lease was granted of the same property to the owner of the last for twenty-one years, from *Michaelmas*, 1824, at 5*s.* rent and for a fine of 7*s.* 6*d.* This lease contained a covenant, on alienation, to pay a fine of 5*s.* to the Corporation by way of fine, and a covenant not to use the premises so as to be a nuisance, and not to build upon the premises.

This lease, which was existing at the time the Municipal Corporation Act passed [1835], expired at *Michaelmas*, 1845. It was not then renewed, but the Corporation had now determined to grant to *Moore* a renewal at the rent of 6*s.* 3*d.* and on a fine of 7*s.* 6*d.*

The late town clerk's evidence was, that the custom of renewal was on payment "of a renewal fine of one and a half year's rent."

Mr. *Follett* and Mr. *Cairns*, in support of the Information. The Corporation are now mere trustees of the corporate property for the inhabitants of *Yarmouth*, and the Act intended to compel them, in dealing with that property, to act strictly as trustees and for the benefit of their *cestuis que trust*. As the intended lease is at an under value and upon a fine, the Defendants must clearly shew, that this case comes within  
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the exceptions stated in the 95th section of the Act. This clause is composed of two branches; the first relates to renewals at a fine certain, and the second to cases where the renewal has ordinarily been made "upon the payment of an arbitrary fine."

If, under the first branch of the clause, "an ancient usage or custom" be relied on, then it must be shewn to be uniform; for, like all ancient prescriptive titles, any variation in it is fatal; *Lovelace v. Reynolds* (a); *Parkin v. Radcliffe* (b). So also if the Defendants insist on the existence of "a practice" to renew, it must be shewn that there has been, for a long period, an uniform practice to renew on similar terms; and it is not sufficient to shew that there has been merely a practice to let the property on lease, on terms varying according to the circumstances and the times. In the present case, there has been no uniformity whatever, and no continuous practice of renewal. Three leases only are relied on, namely, those of 1778, 1798 and 1824, they all vary in their terms, and they were not and do not purport to be renewals. In the first no fine was paid. In the second (which is the only one which commences without an interval from the expiration of the previous term), a fine is taken, and the covenants vary from those in the first. At the expiration of the second, there is an interval of six years, during which there was a tenancy at will, and this at once destroyed any "usage, custom or practice," if any existed. The third lease is granted after six years' interval, and commences, not from the expiration of the former lease in 1818, but from *Michaelmas*, 1824, and the covenants again vary from the former. This, therefore, could not be a renewal of the old lease. The third lease expired in 1845; no new lease

(a) *Cro. Eliz.* 563.


(b) 1 *Bos. & Pull.* 282.

lease was then granted, but the Corporation retained the property, as they say, expecting to make it useful in city improvements. Having retained the property, and having once declined to renew the lease, the discretionary powers given by the Act could not be executed by the Corporation at a future period, when differently constituted in point of members. The law is very strict in cases of renewal, even where there is a positive covenant to renew. If the tenant does not at once avail himself of the option, he cannot afterwards insist on it, and a special Act became necessary in *Ireland* to enable parties holding under leases, with a covenant for perpetual renewal, to obtain the benefit of the covenant after they had allowed the time for renewing to expire.

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Secondly. This case does not come within the second branch of the 95th section, which relates to cases where an arbitrary fine has been taken. Here the fine is proved to be certain, namely, one and a half year's rent; and this case, if within that section at all, must be within the first branch of it.

Mr. *R. Palmer* and Mr. *C. Hall*, for the Corporation and the Councillors. In the Municipal Corporation Act, the legislature has dealt with corporate property in a manner similar to ecclesiastical property, and the intention in both cases was, to give a discretionary power to those having the management of the property, enabling them to realize the just and reasonable expectation of the tenants, after the changes which took place in the Corporations. It was to prevent the injustice which would occur from disappointing the reasonable hopes of a renewal entertained by the tenants who, for a series of years, had held the property, and which, but for the Act, they would, according to the practice in such cases,  
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have been almost sure of obtaining. The various words used in the section shew, that the benefit of the renewal was not to be confined to cases of "ancient usage," according to the strict technical meaning of the word, for it proceeds to extend its operation by the use of the word "custom;" and lest that might be considered a "legal custom," it adds "practice." This shews, clearly and distinctly, that it was not intended that renewals should be confined to cases of usages and customs, in the narrow and technical meaning of those words, but should extend to cases where there had been a "practice" of renewal; the object of the statute was to enable the new corporation, as regards old tenants, to deal in a liberal and equitable spirit, and being an enabling clause, this statute must therefore be construed liberally.

Before the passing of the Act there was no obligation to renew, but the custom and "practice" was to grant a renewal to the old tenant. We admit that the Act gave no positive right to the tenant to have a renewal, for it does not refer to any "tenant right," but it placed a confidence in those who, for the future, were to have the management of corporate property of towns, to act like liberal landlords to their tenants, and for that purpose, it gave them a distinct power to renew in all proper cases. To bring a case within the 95th section, it is not necessary that the former renewals should be uniform, or that they should be identical in terms with the previous leases, either as to fines, rent or covenants. All that it requires is a *bonâ fide* enjoyment under a succession of renewals, and then the renewal may be made, not on the terms of the old leases, but on any terms which the existing corporation may think fit. In the present case, the variations in the three leases are immaterial; the term and rent are the same; and, as to the interval, the mere suspension and delay in granting a new lease did not destroy the "practice,"

"practice," which was admitted by the subsequent grant.

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As to the time which has elapsed since 1845, it is accounted for. An application for a renewal was made by the tenant, which was not rejected, but the consideration of it was postponed, and the grant consequently suspended, but ultimately, in 1852, it was finally resolved to renew, at 7s. 6d. fine and an increase in the rent. The Corporation are authorized to grant the lease proposed.

Mr. *S. Scott*, for the Defendant *Moore*, adopted the same line of argument, and insisted, that if there was to be no renewal, the tenant was entitled to compensation for lasting improvements, made by him on the fair expectation of the usual renewal.

*The Attorney-General v. Green (a)* and *The Attorney-General v. Kerr (b)*.

The case of *Rawstorne v. Bentley (c)* was also referred to.

*The MASTER of the ROLLS* (without hearing a reply).


The question is, whether, in this particular case, the 95th section of the Municipal Corporation Act authorizes the Corporation of *Yarmouth* to grant a lease to Mr. *Moore* at the rent of 6s. 3d. and a fine of 7s. 6d., which I assume to be less than the real value of the property. Before I comment on this clause, I think it proper to state, that in my opinion, it ought to be construed liberally, for it is an enabling clause, and was meant to empower a corporation to do what might be morally, if not legally, just towards their tenants or les-

sees ;

(a) 6 *Ves.* 452.

(b) 2 *Beav.* 420.

(c) 4 *Bro. C. C.* 415.

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sees; and the number of expressions used to extend the meaning of the prior words shew, that it was intended that the clause should be construed liberally.

There are two branches in this clause. The second branch clearly applies only to the case where they have ordinarily made renewals "*upon the payment of an arbitrary fine.*" But this is not the case of a payment of "an arbitrary fine;" for if any fine is properly to be paid, it is one of 7s. 6d., which is the only fine that has been regularly paid for the renewal of this lease.

Now the first branch (omitting that which does not apply) refers to cases in which the Corporation has been "sanctioned or warranted, by ancient usage or by custom or practice," to renew. It is not contended, in the present case, that there has been what may properly be called an ancient usage, or a legal custom or practice, continued for a very considerable length of time, from which it might be inferred that the custom has been immemorial. But it is contended, that this is a case of a Corporation being warranted by "practice" to make a renewal of a lease "at a fine certain or under some special or specific terms or conditions."

In construing this clause, it is important to consider the meaning of the words "renewal" and "practice." It has been contended, that the word "renewal" here can mean nothing more than the grant of a new lease to the holder of the former lease, in respect of his occupation of the land under that lease; for by the last part of the clause the Corporation may "renew such lease for such term or number of years, either absolutely or determinable with any life or lives, or for such life or lives, and at such rent" and on such fine, &c. as the Corporation might have done before the Act. But, in my opinion,  
 the

the word "renewal" cannot receive that extremely large construction; for if it did, the consequence would be, that this section would enable the Corporation to alienate the corporate property, in every case in which there had happened to be a succession of three or four leases, at rack rent and perfectly different in their character, to the same person and the person claiming under him (assuming, of course, that three or four demises would be sufficient to constitute a practice). I am satisfied that that cannot be the construction of this clause, and that the scope and object of this Act of Parliament never meant, that if a piece of land had been originally leased at a rack rent to A., and after that lease had expired had been demised to the assignee of A. at an increased rack rent, and afterwards to another assignee at a different rack rent, these would be renewals in the sense contended for, so that a corporation could, after the passing of this Act, have simply alienated the property by granting leases to them for ninety-nine years at a peppercorn rent; for before the passing of the Municipal Corporation Act, a corporation, not being trustees, might have alienated their property the same as a private individual, and the effect of holding the instance I have given to be a renewal would enable the Corporation to part with or completely destroy the property intended by the statute to be held by them in trust and for the benefit of the city. I am satisfied that that is not the meaning of the word "renewal."

At the same time, I do not at all mean to say, that the meaning of the word "renewal" must be this:—that the lease which is to be renewed must be precisely, in all its terms and conditions, the same as the lease that preceded it; but I am of opinion, that in substance it must be the same, or that there must be such a species of uniformity as to shew that, in point of fact, it is the same lease

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lease which was renewed. Undoubtedly, if you find leases which for a considerable length of time have been renewed at a rent of 5*s.*, and a fine of 7*s.* 6*d.*, with covenants substantially the same, that would constitute a “practice” of renewing the former lease.

I now come to consider whether, in the circumstances of this case, this is a “renewal” within the provisions of the Statute, according to the interpretation, which, in my opinion, ought to be put upon this first branch of the clause. The first lease is that of 1778, which was for a term of twenty-one years, at a rent of 5*s.*, and without any fine. There is nothing whatever to shew that this was a renewal of any former lease, or that the rent reserved was not the fair rent which could be obtained for this small piece of land at that time.

Then comes the lease of 1798, for which a fine of 7*s.* 6*d.* was paid. Therefore, this varies from the former lease in this respect :—that there is an increased consideration by the payment of the fine, and there are certainly additional and important covenants, and is a distinct lease from the former.

The second lease expired on the 29th *September*, 1818, and the lessee remained tenant from year to year, at the former rent, for a period of six years. So that you have first a lease for twenty-one years, at a rent of 5*s.*; upon the expiration of that lease, you have a lease for twenty-one years, with additional covenants, at the same rent, but upon payment of a fine; then you have, at the expiration of that lease, a tenancy from year to year for six years; and at the expiration of that you have a third lease, which was granted in *February*, 1824, for twenty-one years, from *Michaelmas*, 1824, at a rent of 5*s.*, a fine of 7*s.* 6*d.*, and with a slight variation in the covenants. This, on the face of it, is no  
 renewal


renewal of the former lease, because, if it had been, it would have taken effect from the expiration of the former lease, but there is an interval of six years, during which there was a tenancy from year to year, and then a lease is granted in *February*, 1824, not to take effect from any prior period, but seven months later, namely, in *September*, 1824. In my opinion, that is not a renewal of the former lease, but it is a distinct and separate lease. It is true that the tenant held over, so far as the covenants and rent were concerned, on the terms of the old expired lease, but he was a mere tenant from year to year, and might have been evicted at any time.

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Then the Municipal Corporation Act passes, and at that period there was a lease subsisting, which was not a renewal made at the expiration of the former lease, but after an interval, during which there was a tenancy from year to year, and which existing lease varies from the previous lease. It is true, that the three leases have always been granted to a person who occupied the land by virtue of a prior lease, but, in my opinion, the word "renewal" does not include such a case as this, which cannot be said to amount to a "practice."

I concur in the observation of Counsel, that it is not necessary to prove either an ancient usage or a legal custom, in the strict and proper use of these terms, when applied to the proof of heriots, or to the payment of tithes, or a modus in lieu of them; but I think, that to constitute a "practice," there must be such a number of preceding leases of such a similar and uniform character as to amount, though not to a "legal custom," yet to that which in ordinary and common parlance, and by persons not acquainted with the technical import of legal expressions, would be called "a custom," to which the word "practice" is synonymous.

If


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If there had been a practice, by which, upon every renewal, the rent was increased according to a given ratio and proportion, that would, in my opinion, have come within this clause, and be a renewal of a lease warranted by "practice." If, for instance, a lease had been granted for twenty-one years, and the practice of the Corporation had been, to renew at the end of every twenty-one years, on a fine of 7s., and an increase of fifteen per cent. on the rent, that would have been a "practice" within the terms of this clause. But it is clearly established that no such practice applied to this particular land, for the rent has always been the same. If there had been nothing more in the case, and every lease had been renewed upon the expiration of the former lease, exactly upon the same rent and without any alteration, then there would have been strong grounds for saying, that this had been the practice adopted by the Corporation, although I am very far from meaning to lay down, that the mere fact of three demises would constitute a practice in the absence of all other evidence on the subject.

In my opinion, there has neither been an uniform practice of renewal in this case, in any sense of the term, within the proper construction of this clause, nor have the leases been uniform in their character.

Then it is said that Mr. *Moore* is entitled to compensation, but the cases which have been cited by Mr. *Scott* do not apply to the present case. No doubt when this Court sets aside a long lease of charity property, which ought never to have been granted, then in consideration of the injury inflicted upon the person by setting aside a long lease, it does allow him compensation for improvements, which he has made upon the land, upon the faith and upon the consideration that  
 the

the lease was a subsisting lease. But here the lease is at an end, and the only question is, whether a new lease shall be granted. If I am right in this case, this expenditure could only have been made upon the faith of the subsisting lease, and not upon the faith of any right to compel a renewal, which certainly does not exist in this case in the contemplation of anybody, as is shewn by the evidence before me.

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I think, therefore, that this lease is not authorized by this statute.

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A Decree was made for an Injunction with costs, and, after some hesitation,—

*The MASTER of the ROLLS* ordered the costs to be paid out of the corporate funds. *March 5.*

---

is a deficiency of assets, the costs of creditors of proving their debts are not payable in the first instance, but are added to their debts and apportioned with them.

A creditor proposed that of proving their debts should stand, and that the residue should be *pro rata* amongst the creditors.

Mr. Follett and Mr. Wickes

The MASTER of the Rolls of 26th August, 1841 (a), as of the 11th of April, 1842, said it settled, that the costs of creditors' debts must be added to the debts, and the apportionment must then be made of the whole amount.

(a) Ordines

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AN  
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ABATEMENT.

suit, which has been abated for more than twenty years, cannot be revived. *Bland v. Davison.*

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See REVIVOR.

ABSOLUTE INTEREST.

See LAPSE.

ABSTRACT.

See COSTS, 3.

TAXATION, 1.

ACCELERATING POWERS.

See POWER OF SALE, 2, 3.

ACCOUNT.

See STATUTE OF LIMITATIONS.

ACQUIESCENCE.

See BREACH OF TRUST, 3.

ACT OF PARLIAMENT.

See EVIDENCE, 4.

DL. XXI.

ADMINISTRATION SUIT.

After a decree in *England* for the administration of an English testator's estate, a Scotch company, whose *situs* was in *Scotland*, but which had agents and houses of business in *England*, commenced proceedings against the representatives in *Scotland*, where the testator possessed real and personal estate, to recover a debt. An injunction was granted to restrain the proceedings in *Scotland*, but which on appeal was discharged by the House of Lords. After this, the company commenced another action in *Scotland*, and a motion was made to restrain it, on the ground of the company having come in and adopted the proceedings in *England*. The application was refused by the Master of the Rolls, and by the full

T T

Court of Appeal. *Stainton v. The Carron Co.* Page 152

### AGREEMENT.

See CONTRACT.

#### "AND" READ "OR."

Bequest to *A.* for life, and, after his decease, to his eldest son; but in case *A.* should "die under age and without issue," over. Held, that the word "and" was not to be read "or," and that *A.*'s son, in his father's lifetime, took a vested interest, not subject to be divested. *Malcolm v. Malcolm.* 225

### ANNUITY.

See LIEN, 1.

POWER, 2.

### ANTICIPATION.

1. Where there is attached to the separate estate of a married woman a clause against anticipation, the Court has no power to release it from that restraint, even in cases where it would manifestly be for her benefit to do so. *Robinson v. Wheelwright.* 214
2. Thus, where a testator gave a married woman a legacy, on condition that she conveyed, within twelve months, her separate estate, which was subject to a restraint against anticipation, to *B.* and *C.*, the Court held, that effect could not be given to the bequest, though highly beneficial to the *feme coverte*. *Ibid.*

### APPOINTMENT.

1. A trust term was created for raising

the sum of 10,000*l.*, with interest from the death of the tenant for life, for his younger children as he should appoint, and in default to them equally. He appointed the fund to his two younger children, in unequal proportions, *after the decease of himself and of his mother*. Held, that the intermediate interest, between the death of the tenant for life and his mother, was unappointed, and that it belonged to the two children equally, and did not pass as accessory to the capital appointed. *Watts v. Shrimpton.* Page 97

2. Devise to the use of such of the children of *A. B.* and their heirs, "for such estates," and in such manner and form as *A. B.* should appoint. Held, upon the context, to authorize an appointment to a grandchild. *Fowler v. Cohn.* 360
3. A power to appoint an estate authorizes an appointment to trustees to sell and divide the produce between the objects. *Ibid.*
4. A testator had a power to appoint a fund, and his son (*A.*) and grandson (*B.*) were objects. Having by deed appointed part to his son, he, by will, reciting that the son could, under the hotchpot clause, be obliged to bring in the appointed part, proceeded, "and then as I make no further appointment," the whole settled fund must be equally divided between *A.* and *B.* He made *A.* his residuary legatee. It turned out that the hotchpot clause did not apply.

Held, first, that the will did not operate as an appointment, and, secondly, that no case of election arose. *Langslow v. Langslow*.

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See POWER.

RELATIONS.

ASSETS.

See REAL AND PERSONAL ESTATE.

ASSIGNEE.

See TAXATION, 11.

BANKRUPT.

See BREACH OF TRUST, 1.

BANKRUPTCY.

Under a marriage settlement the husband was entitled to a life interest in all the wife's after-acquired property. The husband became bankrupt, and obtained his certificate. The wife afterwards became entitled to the residuary estate of her deceased sister, as next of kin. Held, that the assignees were not entitled to the husband's life interest in this property. *In re Inkson's Trusts*. 310  
See BREACH OF TRUST, 1.

BEQUEST.

Bequest to wife for life, and afterwards to all the testator's nephews and nieces living at the death of his wife, namely, "all the children of my brother S. H.," &c. (naming the greater part, but not the whole of his brothers and sisters, and excepting one of his nieces by

name, and giving her a legacy). Held, that this was not a gift to a class consisting of all the testator's nephews and nieces, but to the children only of those brothers and sisters who were specifically named. *In re Hull's Estate*.

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See "AND" READ "OR."

LEGACY.

LIFE INTEREST.

WILL.

BLENDING ASSETS.

See REAL AND PERSONAL ESTATE.

BOND.

See LIEN, 1.

BREACH OF TRUST.

1. Where a trustee who is indebted to the trust becomes bankrupt, it is his duty to prove the debt, and if he neglect so to do, he is liable for the loss, notwithstanding his certificate. *Orrett v. Corser*. *Corser v. Orrett*. 52
2. A plaintiff sued his trustee, to make him responsible for a trust fund which had been wrongfully paid to the Plaintiff's father. The Plaintiff had, as one of the next of kin of his father, received two-thirds of his estate. Held, that the father's assets in the hands of the Plaintiff were primarily liable to make good two-thirds of the trust-fund, in exoneration of the trustee. *Ibid*.
3. In 1799, a testator devised an estate in trust for his daughter and her husband successively for life, with remainder to their children,



and he gave to the trustee a power of sale. The trustee died in 1806, and the trust descended on his heir *A.* Immediately afterwards, *B.*, acting without authority as trustee, sold the estate to a purchaser with notice, and allowed the purchase-money to be received by the daughter's husband. The husband died in 1837, and in a suit instituted by one of the children, his estate was declared liable for the purchase-money in his hands. The daughter died in 1845, and, in a suit by her representatives, the estate of *B.* was held liable for the trust-money to the extent of the daughter's interest only, and relief was refused to the children, who were Defendants. Between 1826 and 1830 the children had executed deeds reciting the sale, &c. In 1851 some of them instituted a suit to recover the estate itself from the purchaser. Held, that they were entitled to no relief; and, in a cross-suit by the purchaser, the children were decreed to make good his title. *Hope v. Liddell* (No. 1), *Liddell v. Norton*. Page 183

4. A testator gave annuities to the Plaintiffs and appointed three executors, one of whom (*A. B.*) was the residuary legatee. No fund was set apart to answer the annuities, but *A. B.* was permitted by his co-executors to receive the assets, which he wasted, though he paid the annuities for eighteen years, at the end of which he became insolvent. Held, that the

co-executors were liable to the Plaintiffs for *A. B.*'s receipts. *Egbert v. Butter*. Page 560

5. A testator devised a real estate to *A. B.* for life, in terms which gave him the legal estate, and he bequeathed to him his personal estate, subject to some annuities bequeathed to the Plaintiffs, and appointed him an executor. *A. B.* wasted the assets. Held, that his life estate in the realty was not liable to make good the annuities. *Ibid.*

See DEVASTAVIT.

MUNICIPAL CORPORATION ACT.

POWER OF SALE, 1.

TRUSTEE, 2.

#### CASES REVERSED OR OBSERVED UPON.

1. The report of the case of *Pope v. Whitcombe* (3 Mer. 689) is inaccurate. *Finch v. Hollingsworth*. 112
2. The doctrine of *Trye v. The Corporation of Gloucester* (14 Bear. 173) adhered to. *Philpott v. St. George's Hospital*. 134

#### CHARGE.

See MERGER.

#### CHARGE OF DEBTS.

1. A mere desire expressed by a testator in his will that his debts shall be paid, creates a charge on his real estate for their payment. *Wrigley v. Sykes*. 337
2. A general charge of debts on the real estate gives to the executors an implied power of sale. *Ibid.*

3. Distinction between the expression of a desire that all debts shall be paid, followed by a gift of a particular estate for the payment, and a general charge of the real estate with the debts, followed by a particular provision for their payment. In the former, the general charge is qualified and limited to the particular estate, but in the latter it is not. *Wrigley v. Sykes*. Page 337

4. A "testator" ordered his debts and legacies "to be paid and discharged out of his real and personal estate." He subsequently devised his real estates to trustees for five hundred years, and subject thereto, to his five sons as tenants in common in fee, "upon condition" that they should pay, in equal shares, certain legacies and his debts; and in case any son should neglect to pay his portion, the trustees of the term were, out of the rents of his share, to raise the amount. He appointed the five sons executors. Thirty-three years after the death of the testator, the surviving executors sold the estate, as they alleged, to pay the debts. The Court held, that they had power to sell, and decreed a specific performance against the purchaser. *Ibid*. 337

#### CHARITY.

1. Under the powers of an Act of Parliament, assented to by the Crown, as lord of a manor, and by the commoners, King George III. granted to the vestry of *Richmond* a portion of the common, for

a workhouse, a cemetery, and "in trust for the employment and support of the poor of the said parish." Held, upon the construction of the act and the grant, that, although this was a charity, the income might properly be applied in aid of the poor-rates and so in relief of the parish. *Attorney-General v. Blizard*. Page 233

2. When lands are given to charity purposes on the happening of a particular event, there is a resulting trust in the meanwhile; but where real estate was vested in A. in trust, out of the rents, to keep it ready for the reception of plague patients, during their sickness, but no longer, and for a burying-place for them, and for no other use, &c., it was held, first, that this was a good gift to charitable purposes, and not merely a gift contingent upon the re-appearance of the plague; and, secondly, that there was no resulting trust in the meanwhile for the donor or his heirs, though the plague had not reappeared for more than 180 years. *Attorney-General v. Earl of Croen* 392

See GIFT OVER.

LASTING IMPROVEMENTS.

MORTMAIN.

#### CHILDREN.

1. Where the words "children" and "issue" are used interchangeably in a will, the operation of the word "children" may be extended to "issue generally" to effectuate the intention. *Harley v. Mitford*. 280
2. A testator declared, that in case his

daughters should "leave issue," they might appoint a fund "unto such children" "in such manner" as they should choose, and, in default of any child, they might appoint it to their sisters and their children. "And in case all his daughters should die without issue," then over. Held, that "children" must be construed issue, and that an appointment to a grandchild was within the power. Held also, that the word "such" did not refer to issue a daughter might leave, but to such of the class as she might choose. *Harley v. Mitford*. Page 280  
See WILL, 1.

#### CHOSE IN ACTION.

See NOTICE, 3.

#### CLASS.

Bequest to wife for life and afterwards to all the testator's nephews and nieces living at the death of his wife, namely, "all the children of my brother S. H.," &c. (naming the greater part, but not the whole of his brothers and sisters, and excepting one of his nieces by name, and giving her a legacy). Held, that this was not a gift to a class consisting of all the testator's nephews and nieces, but to the children only of those brothers and sisters who were specifically named. *In re Hull's Estate*. 314  
See BEQUEST.

#### COMPANY.

See WINDING-UP ACT.

#### COMPENSATION.

On their marriage, a lady and her husband covenanted to settle her real estate, on trusts, under which the husband was to have a life estate therein, and the wife obtained benefits in her personalty which she would not have been otherwise entitled to, and had a power to appoint a fund by will. She appointed it to strangers, and on her death the settlement turned out to be inoperative as to her real estate, she having been an infant when she executed it. The husband lost his life estate in it. Held, that the appointees were not volunteers but purchasers under the wife, and that the husband was not entitled to compensation out of the wife's personal estate included in the settlement for the loss of his life estate in the wife's realty. *Campbell v. Ingilby*. Page 567

#### CONCEALMENT.

See MISREPRESENTATION.

SETTING ASIDE CONTRACT.

#### CONDITION.

Where a legacy is given on condition, it must be strictly and literally performed; but where a bequest was made to A., on condition that he conveyed his estate to B. and C., in such shares as shall be determined by [blank], it was held, that the gift was not rendered ineffectual by reason of the blank. *Robinson v. Wheelwright*. 214

See ANTICIPATION.

**CONDITIONS OF SALE.**

Under special conditions, on the sale of leaseholds, it was provided, "that possession should be deemed conclusive evidence of the due performance or sufficient waiver of any breach in the covenants in the lease, up to the completion of the sale." Held, that this would cover all breaches down to the contract, but not breaches of covenant subsequently committed by the vendor, by which a forfeiture was incurred. *Honell v. Kightley*. Page 331

See COSTS, 2.

TITLE DEEDS.

**CONSTRUCTION.**

In the construction of wills the Court looks not only to the terms of the will itself, but to the surrounding circumstances and the state of the parties. *Pasmore v. Huggins*. 103 See "AND" READ "Or."

BEQUEST.

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CLASS.

CONDITION.

CONTINGENCY.

EXECUTOR.

LAPSE.

LEGACY.

LIFE INTEREST.

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POWER, 1, 2, 3.

REAL AND PERSONAL ESTATE.

RELATIONS.

REMOTENESS, 1, 4.

RESIDUE, 1, 2.

SURVIVORSHIP.

VESTING.

WILL, 1, 2, 3, 6.

**CONSULTATION.**

See TAXATION, 5.

**CONTINGENCY.**

1. Construction of a gift, pending a contingency, "to the person for the time being entitled in immediate expectancy." *Westcar v. Westcar*. Page 328
2. Real and personal property were given to the eldest son of *A.* who should be living at his decease and attain twenty-one. The income, after twenty-one years' accumulation, was given "to the person for the time being entitled in immediate expectancy" to the property. At the end of twenty-one years *A.* was living and had children, who were all minors. Held, that the eldest minor was entitled to the income until *A.*'s death. *Ibid.*
3. Personal estate was given upon a contingency, and the "income" was to accumulate in the meanwhile as long as lawful. There was a proviso that, subject thereto, the "income" was to be paid to the person "entitled in immediate expectancy." The rents of the real estate were then given upon the same trusts as had been declared concerning the "residuary personal estate," and upon the personal estate becoming vested, to convey the real estate to the same person. Held, that all the trusts of the personal estate were applicable to the real estate, and that the person entitled in immediate expectancy to the income of the personal estate was also entitled

to the rents of the real estate.  
*Westcar v. Westcar.* Page 328  
 See CONTINGENT ESTATE.

#### CONTINGENT ESTATE.

1. A contingent estate in fee under a shifting clause may be devised both by the old and new law.  
*Ingilby v. Amcotts.* 585
2. Devise to *A.* of estate *X.* in fee, with an executory shifting limitation to *B.* and her heirs, in the event of *A.* becoming entitled to another estate, *Y.* *B.* died first, and her estate descended on *C.*, her heir, who by his will, in 1851, made a general devise of his real estate. Some months after his death, the event took place on which the *X.* estate was to shift from *A.* to *B.* Held, that the estate *X.* passed by *C.*'s will, and did not descend either to the heir of *B.* or of *C.* *Ibid.*

#### CONTRACT.

*A.* and *B.* were partners for four years in the *K.* Mill, and *A.* and *C.* were sub-partners at will. *A.* put an end to his sub-partnership with *C.* They afterwards met and *A.* drew up this document: "Mr. *C.* to receive three-sixteenths of the *K.* Mill during the present partnership of *A.* and *B.* If Mr. *C.* enters into any other business before, to renounce his interest above mentioned, and to receive 500*l.* as a quit claim." It was taken to a solicitor to draw a formal agreement, who said it was too vague to act upon, and both parties differed as to its con-

struction. Held, that it was not a final concluded agreement, which could be enforced. *Frost v. Moulton.* Page 596

See MARRIAGE SETTLEMENT.

MISREPRESENTATION, 2.

SETTING ASIDE CONTRACT.

VENDOR AND PURCHASER.

#### CONTRIBUTION.

A suit was instituted against the directors of an abortive company, to make them liable for acts of mismanagement and for the misapplication of its funds. This was compromised by an order on the Defendants to pay a fixed sum. One of them having paid more than his share, Held, that he could sustain a suit simply for contribution in respect of the compromise, and that the co-directors were not entitled, without a cross bill, to make the Plaintiff, at the same time, account for his general liabilities to the company. *Prole v. Masterman.* 61

#### COSTS.

1. According to the new practice, 15 & 16 *Vict.* c. 86, s. 56, in cases of sale by the Court, an abstract of title is submitted to Counsel to prepare the conditions of sale. Counsel having made certain queries upon four sheets of an abstract, the vendor's solicitor charged 1*l.* 1*s.* for perusing the same, &c., and 4*l.* 6*s.* 8*d.* for a second fair copy of the abstract for the purchaser's solicitor. The Taxing Master disallowed the first item, and reduced the second to

- 13s. 4d., which he allowed for re-copying the four spoiled sheets of the abstract, to render it fit to be sent to the purchaser's solicitor. On a petition to review, held, that the Taxing Master was right, and that they were matters entirely within the discretion of the Taxing Master. *Rumsey v. Rumsey. Ex parte J. C. Rumsey.* Page 40
2. The solicitor usually charges for drawing the conditions of sale, though they are really drawn by Counsel, and he is thereby remunerated for the trouble of answering Counsel's *queries. Ibid.*
3. A second fair copy of abstract is not allowed, except under special circumstances, as where the notes of Counsel render the copy laid before him wholly unfit to go to the purchaser. *Ibid.*
4. In an administration suit, all proper and necessary parties have their costs prior to the administration of the fund. But in suits by mortgagees to ascertain priorities upon an estate, or upon a fund produced by it, after the proper costs of the Plaintiff are paid, the costs of the other incumbrancers are added to their securities, and paid in the order of their priorities. *Ford v. The Earl of Chesterfield.* 426
5. Where there is a deficiency of the assets, the costs of creditors of proving their debts are not payable in the first instance, but are added to the debts and apportioned with them. *Morshead v. Reynolds.* 638

*See* LANDS CLAUSES ACT, 2, 3.  
 PARTITION.  
 SOLICITOR AND CLIENT.  
 TAXATION.  
 TRUSTEE AND CESTUI QUE  
 TRUST, 1, 2.

COUNSEL.  
*See* TAXATION, 1, 2, 4, 5.

COURT ROLLS.  
 The usual order was made for the deposit by the Defendant of all documents in his possession. Some of them consisted of the court rolls of a manor, of which the Defendant acted as steward, but his right to that office was contested. The Court released the Defendant from the necessity of depositing them in Court, and ordered the production at the steward's. *Carew v. Davis.*  
 Page 213

COVENANT.  
*See* CONDITIONS OF SALE.

CREDITORS.  
*See* COSTS, 5.

CROSS BILL.  
*See* CONTRIBUTION.

DECREE.  
 1. A testator, in 1823, directed his trustees to apply such part of a moiety of the surplus rents, as they in their discretion should see fit, for the maintenance, &c. of his younger children during his

widow's life, and, at her decease, to pay then 1,000*l.* a piece. Subject thereto, *A. B.* was absolutely entitled to the estate. In a suit for the performance of the trusts, the estate was sold, and a fund was set apart to provide for the widow's dower, which was ordered to be charged with the legacies payable at her death, and *A. B.* was declared entitled to the remaining fund. The widow died in 1854, and no provision having been made for the children's maintenance under the discretionary direction, a younger child sought to obtain payment out of the dower fund, but the Court held, that whatever his rights might be, they had been concluded by the previous orders made in this cause.

*Livesey v. Harding.* Page 227

2. Form of decree on setting aside deeds partially, viz., as against creditors only. *Bott v. Smith.*

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See JUDGMENT.

#### DEED.

See NOTICE.

REFORMING DEED.

REMOTENESS, 2.

#### DEPOSITIONS.

See EVIDENCE, 3.

#### DEVASTAVIT.

The husband of an executrix or administratrix is liable for all the assets received or *devastavit*s committed by himself or by his wife during the coverture, and his estate remains liable after his death.

The husband of an executrix, who was liable for a breach of trust, made his wife and two others his executrix and executors. "They possessed themselves of all his assets." Held, that the husband's liability was not satisfied by the circumstance of his widow uniting in herself the two characters; and in a suit to charge the husband's assets, an inquiry as to the amount of such assets received by her was refused, and it was held, that her legal personal representative was not a necessary party. *Smith v. Smith.* Page 385  
See BREACH OF TRUST, 5.

#### DEVISE.

A trustee devised "all his real estates, whatsoever and wheresoever," charged with a legacy. Held, that the trust estates did not pass. *Hope v. Liddell.* (No. 1.) 183

See CONTINGENT ESTATE.

RESIDUARY LEGATEE, 2.

WILL.

#### DISCOVERY.

See PENALTY.

#### DISMISSAL FOR WANT OF PROSECUTION.

The Plaintiff required *A.*, but not *B.*, to answer the amendments. *B.*, who did not desire to answer, moved after fourteen days to dismiss. Held, that the case was not within the 115th Order of May, 1845. *Brown v. Butler.* 615

#### DOMICIL.

An Englishwoman married a domi-

ciled Frenchman. Articles were, previous to the marriage, executed in the English form, by which the wife became entitled to 200*l.* a year. Her husband afterwards separated from her, and subsequently the French Court condemned her for adultery. Held, that the contract of marriage was English, and that the rights of the parties were to be regulated by English law, and further property of the wife having fallen into possession, and the moral conduct of both parties being reprehensible, the income of the fund must be equally divided between them. *Watts v. Shrimpton.* Page 97

#### ELECTION.

1. The testator devised to *A.* and *B.* successively for life, and to the first and other sons of *B.* in tail, not only his own fee-simple estates, but others of which he was tenant in fee in remainder (subject to intermediate estates to *A.* and *B.*) in fee. It was held, upon the construction of the terms of the will, that the testator intended to dispose of more than his own interest in the settled estates, and that therefore *A.* and *B.* were bound either to give effect to the will, or to make compensation. *Wintour v. Clifton.* 447
2. In order to constitute a concluded election, the act done must be with a full knowledge of the circumstances of the case and the rights to which the person put to his election was entitled. *Wintour v. Clifton.* Page 447
3. *Clifton* Hall, and the manor and estate of *Wilford*, stood limited to the testator for life, with remainder to *A.* for life, with remainder to *B.* in tail, with remainder to the testator in fee. The testator was also seised in fee of newly purchased lands at *Wilford* and of other hereditaments. He devised "his manor" of *Wilford* and "his mansion-house" called *Clifton* Hall, and his fee-simple property, to *A.* for life, with remainder to *B.* for life, with remainder to *B.*'s first and other sons in tail, &c. &c. The will empowered the tenants for life, when in possession, to lease (except the mansion, &c.), to jointure, and to charge portions for younger children. The testator also gave pictures, &c. as heirlooms, and his personal estate was to be invested on like trusts. The testator died in 1837, and in 1848 *A.* and *B.* suffered a recovery. Held, that by his will, the testator was disposing not only of his reversion, but of the fee-simple in the settled estates, and that therefore *A.* and *B.* were bound to elect: and, secondly, that they had not elected by joining in the recovery. *Ibid.*
4. Precatory words will not create a case for election, neither will the absence of the execution of a power upon an erroneous impression, stated in the will, that, by its non-execution, *A.* (a legatee) will di-



estate, or abandon benefits in personal estate conferred on her by the settlement. *Campbell v. Ingilby*. 567

See APPOINTMENT, 4.

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#### EVIDENCE.

1. Entry of a payment of a deceased person against his interest, held admissible. *Orrett v. Corser*, *Corser v. Orrett*. 52
2. Entry by a deceased person shewing (in contradiction to a deed evidencing a rightful payment by him) that the payment had been made in breach of trust to *A. B.* instead of to the trustees, held admissible in evidence to shew the receipt by *A. B.*, on the ground that such entry tended to charge the maker of it. *Ibid*.
3. *A.*, without authority, sold a trust estate to *B.* In a suit to recover the money from *A.*, *B.*, who was not a party, was examined as a witness. A suit was afterwards instituted against the representatives of *B.*, to recover the estate itself and an order of course was

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*B.* to the Plaintiff, but without any express mention of the exoneration clause. The Plaintiff having filed a bill to enforce the exoneration clause, without making the trustees of the settlement parties, it was dismissed, with costs. *Rooke v. Lord Kensington.* Page 470

2. Whether the Plaintiff was in a situation to enforce the contract, under the terms of his security, *quære. Ibid.*
3. The time for exercising the trust for sale would seem to be, when the *B.* estate would be made liable to pay the charge on the *A.* estate. *Ibid.*

EXPECTANCY.

*See* CONTINGENCY.

EXTRINSIC EVIDENCE.

*See* REVOCATION, 2.

FEME COVERT.

*See* ANTICIPATION.  
EXECUTOR.

FOREIGN LAW.

*See* ADMINISTRATION SUIT.  
DOMICIL.

FOREIGN RAILWAY.

Bill by an English shareholder against a Dutch Railway Company, to be relieved against a forfeiture of shares, dismissed with costs, the undertaking and direction being

foreign, and there being a decision in the Dutch Courts opposed to the Plaintiff's view. *Sudlow v. Dutch Rhenish Railway Company.*

Page 43

FRAUD.

*See* FRAUDULENT DEED.

MISREPRESENTATION.

SETTING ASIDE CONTRACT.

FRAUDULENT DEED.

1. A deed may be void as against creditors though full consideration is given for it, if it be in such a form as to defeat the creditors and be executed with that intention. *Bott v. Smith.* 511
2. In *June*, 1854, the Plaintiff recovered a judgment against *E. S.*, as overseer of a parish, for 238*l.*, and three days after, an order *nisi* issued for an attachment. In *September* following, *E. S.* conveyed all his estate and effects to his son, in consideration of his lodging, maintaining and clothing him for life, and paying 75*l.* on his death, and indemnifying him against a mortgage debt on the property, and which he secured by bond. The full consideration was not given, but the difference was not great. The Court being of opinion that the deeds were made with a view of defeating the Plaintiff's execution, set aside the transaction as against the creditors. *Ibid.*

*See* MISREPRESENTATION.

FREIGHT.

*See* SHIP, 2.

3rd of 7th August, 1852.

*See* PRINTED BILL, 2.

47th of 26th August, 1852.

*See* COSTS, 5.

#### GENERAL RESIDUE.

*See* RESIDUE, 5, 6.

#### GIFT OVER.

A testator, in case any person should give a suitable piece of land for almshouses, gave a sum of money to be devoted to the charity, with a gift over of the fund, if no such piece of land should be provided or the scheme should not be approved of by his trustees. The land was provided, and no difficulty interposed as to the scheme, but the gift of the money was held void as contrary to the policy of the Mortmain Act. Held, that the gift over did not take effect. *Philpott v. St. George's Hospital.*

Page 134

#### GRANDCHILDREN.

*See* CHILDREN.

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between the three might be determined by the Court, for due cause, without setting aside the deed of indemnity, which might be the subject of another suit. *Harrison v. Tennant.* Page 482

INFANT.

An infant, on coming of age, may ratify securities given by him during his minority, without receiving any further consideration, but he must, on the occasion, have full knowledge and complete information respecting the transaction. *Kay v. Smith.* 522

See ELECTION, 5.

MISREPRESENTATION, 3.

INJUNCTION.

See ADMINISTRATION SUIT.

SHIP, 1.

INQUIRY.

On the cause coming on for further consideration, the Defendant, who was entitled to a moiety, insisted that she was purchaser for valuable consideration of the other moiety. Held, that, although no such point had been raised by her answer, she was still entitled to make it available, and an inquiry was directed. *Lync v. Lync.* 318

INTEREST.

A trust term was created for raising the sum of 10,000*l.*, with interest from the death of the tenant for life, for his younger children as he should appoint, and in default to

them equally. He appointed the fund to his two younger children, in unequal proportions, *after the decease of himself and of his mother.* Held, that the intermediate interest, between the deaths of the tenant for life and his mother, was unappointed, and that it belonged to the two children equally, and did not pass as accessory to the capital appointed. *Watts v. Shrimpton.* Page 97

INTERNATIONAL LAW.

See DOMICIL.

FOREIGN RAILWAY.

IRREGULARITY.

See PRINTED BILL.

TAXATION, 8, 10.

JOINT OWNER.

See LIEN, 2.

JUDGMENT.

A judgment creditor ranking after a first mortgagee, but prior in date to a further charge, and to other judgments, Held entitled to a foreclosure, although all the other parties insisted on a sale. *Messer v. Boyle.* 559

JURISDICTION.

See ADMINISTRATION SUIT.

FOREIGN RAILWAY.

LACHES.

See SETTING ASIDE CONTRACT.

Lands Clauses Consolidation Act, the promoters are not liable to pay the costs incurred by the application of their purchase-money in paying off an incumbrance on other parts of the estate of the owner. *Ibid.*

3. Moneys paid into Court by two Companies, under the Lands Clauses Consolidation Act, ordered to be paid out on one petition, and the costs to be apportioned between the two companies. *Ibid.*

#### LAPSE.

Bequest of a quarter of a residue to A., and, on his death, to his children, but if he should die without leaving lawful issue as aforesaid, then to B. and three other persons, and to the respective issue of such of them as should die leaving issue, such issue being intended to take the share which their parent would have taken if living. A. died in the lifetime of the testatrix without having been married. B. survived

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tator at his death had ceased to occupy that house, and had no furniture, &c., therein. Held, that the bequest failed. *Spencer v. Spencer.* Page 548

See LIFE INTEREST.

RESIDUE, 4.

#### LIEN.

1. *A.* agreed to purchase an estate from *B.*, and upon the estate being conveyed, to grant a life annuity to *B.*, "to be secured by bond." Held, that *B.* had no lien on the estate for payment of the annuity, and was merely entitled to have it secured by the bond of the purchaser. *Dixon v. Gayfere* (No. 3). 118

2. *A.* and *B.* were joint owners of a house, and *A.* had laid out on it monies he had obtained from *B.* Held, that *B.* had no lien on the house for the amount. *Kay v. Johnston.* 536

#### LIFE INTEREST.

- A* testatrix bequeathed a legacy to *A.*, his executors, &c., "but in case he should die leaving lawful issue," she bequeathed it to *A.*'s children. *A.* survived the testatrix. Held, that *A.* took a life interest only. *Johnston v. Antrobus.* 556  
See MERGER.

#### LIMITATION.

See WILL, 3, 4, 5.

#### MANOR.

See COURT ROLLS.

PRODUCTION.

VOL. XXI.

#### MARRIAGE.

See MISREPRESENTATION, 1.

#### MARRIAGE SETTLEMENT.

In the case of marriage contracts, it is impossible to set them aside after the marriage, on the ground of a failure of a pecuniary consideration on one side. *Campbell v. Ingilby.* Page 567

#### MERGER.

The owner of an estate voluntarily charged it with his own simple contract debt, and, by the same deed, settled the estate, subject thereto, on himself for life, with remainder to his daughter. He afterwards paid off the debt, but declared that the charge should continue for the benefit of his personal estate. After his death, held, that the charge still subsisted and must be raised and paid. *Jameson v. Stein.* 5

#### MINE.

See STATUTE OF LIMITATIONS.

#### MISREPRESENTATION.

1. Where a person seeks to make a third party make good representations made by him on his marriage, he must establish, and that clearly, first, that sufficient representations were made; and secondly, that the marriage took place on the faith of them. *Jameson v. Stein.* 5
2. A husband and wife alleged, that, on their marriage, the wife's father stated in a letter, which, however,

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they stated had been destroyed, "that he could do no more for her than he had done, and that he had settled his *W.* estate upon her." He had, in fact, previously settled that estate on her, but subject to a prior charge of 5,000*l.* They sought to have the representation made good, by payment of the 5,000*l.* out of the father's estate. The Court doubted whether the principle applied to such a representation, and also whether the marriage took place on the faith of it, and refused relief. *Jameson v. Stein.* Page 5

3. The Plaintiff had, during his minority, accepted bills to a considerable amount, which he handed to *A.*, who raised money on them from *B.* and *C.*, in whose hands the bills had remained. Immediately on coming of age, the Plaintiff in the belief, brought about by the misrepresentations of *A.*, *B.* and *C.*, that the bills were in circulation, and that they had bought them up for the purpose, gave to *B.* and *C.* securities for the amount of the bills in their hands. The securities were set aside unconditionally, on the ground of the misrepresentation and the want of due information. *Kay v. Smith.* 522  
See TRUSTEE.

#### MISTAKE.

If one party be acting under a misapprehension, and the other is accessory to it, although unintentionally, the transaction cannot stand. *Hartopp v. Hartopp.* Page 259  
See REFORMING DEED.

#### MORTGAGE.

- A judgment creditor ranking after a first mortgagee, but prior in date to a further charge and to other judgments, held, entitled to a foreclosure, although all the other parties insisted on a sale. *Messer v. Boyle.* 559  
See EXONERATION, 1.

#### MORTGAGOR AND MORTGAGEE.

See COSTS, 4.  
JUDGMENT.

#### MORTMAIN.

1. A testator demised eight acres at *N.* to *B.*, and he directed, that if any person should, within twelve months from his death, give a suitable piece of land in *N.*, as the site of almshouses, his executors should pay to the trustees 60,000*l.*, to be devoted to the purposes of the charity. *B.*, who was an executor, devoted the eight acres to the charity. Held, that the bequest of the money was void, as contrary to the policy of the Mortmain Act. *Philpott v. St. George's Hospital.* 134
2. A testator, in case any person should give a suitable piece of land for almshouses, gave a sum of money to be devoted to the charity, with a gift over of the fund if no such piece of land should be

provided or the scheme should not be approved of by his trustees. The land was provided, and no difficulty interposed as to the scheme, but the gift of the money was held void as contrary to the policy of the Mortmain Act. Held, that the gift over did not take effect. *Philpott v. St. George's Hospital.* Page 134

See CHARITY.

GIFT OVER.

### MOTION.

See MOTION BY DEFENDANT TO STAY PROCEEDINGS.

### MOTION BY DEFENDANT TO STAY PROCEEDINGS.

1. Motion by Defendants to stay proceedings in a suit, upon certain terms, on the ground that the same questions were in issue in a suit instituted by them against the Plaintiffs in *Scotland*, and which the Court had refused to stay, refused with costs. *Stainton v. The Carron Company* (No. 3). 500
2. *A.* proceeded against the executors of *B.* in *Scotland*. In a creditor's suit in this Court by the executors, *A.*'s proceedings were restrained by injunction, but after three years' delay, the order was reversed on appeal. In the meanwhile, the executor had instituted a suit here against *A.* on the same subject. It having been held that *A.* had a right to proceed in *Scotland*, he moved to stay the ex-

ecutors' proceedings here, until the question had been decided in *Scotland*. The motion was held irregular, and refused with costs. *Stainton v. The Carron Company* (No. 3). Page 500

### MOTION TO DISMISS.

See DISMISSAL FOR WANT OF PROSECUTION.

### MULTIFARIOUSNESS.

See LANDS CLAUSES ACT, 3.

### MUNICIPAL CORPORATION ACT.

1. The 95th section of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), which enables municipal corporations to renew leases on a fine, in cases where sanctioned "by ancient usage or by custom or practice," at "a fine certain," or where they "have ordinarily made renewal" upon "an arbitrary fine," is to be construed liberally. *Attorney-General v. The Corporation of Great Yarmouth.* 625
2. The word "renewal," in the Municipal Corporation Act, does not mean a mere custom to let on lease at different rents, and though the renewals need not be on precisely the same terms, there must be such an uniformity as to shew that the same lease has been renewed. *Ibid.*
3. Leases were granted by a municipal corporation of the same property in 1778, 1798 and 1824, to the same lessee and his assigns for



the 95th section of the Municipal Corporation Act, and that a renewal could not be granted at an under value and on a fine. *Attorney-General v. The Corporation of Great Yarmouth.* Page 625

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#### NEXT OF KIN.

Gift to *A.* for life, and after her decease to her children, and in case of their death before the vesting of their shares, in trust for her next of kin. The daughter never had any children. Held, that her next of kin were nevertheless entitled. *Tennant v. Heathfield.*

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#### NOTICE.

1. Whether the notice of the existence of a settlement was not notice of its contents, *quære.* *Jameson v. Stein.* 5
2. A will was inaccurately recited in a conveyance. Held, nevertheless that the purchaser had

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and operation are not sufficient to invalidate the transaction, if it be not exerted for the benefit of the person possessing it. *Hartopp v. Hartopp.* Page 259

2. Transactions between parent and child are to be regarded with jealousy, but, in arrangements between father and son for the resettlement of family estates, if the resettlement be not obtained by misrepresentation or suppression of the truth, if the father acquires no personal benefit, and if the settlement is a reasonable one, the Court will support it, even though the father did exert parental authority and influence over the son to procure the execution of it. *Ibid.*

3. The Plaintiff was tenant in tail, and the Defendant, his father, tenant for life of family estates. The Plaintiff, eleven months after attaining twenty-one, being in pecuniary difficulties, joined his father in a resettlement of the estates. The Court, though satisfied that parental authority and influence had been exerted to obtain the execution of the settlement, but not for the father's individual advantage, who obtained no direct personal benefit from it, supported the settlement, holding that a jointure thereby provided for the son's mother did not come within the definition of benefit to the father, and that the postponement of the son's daughters to his younger brother was not unreasonable, considering that thereby

the estates were made to accompany the family title. *Hartopp v. Hartopp.* Page 259

#### PAROL EVIDENCE.

See REVOCATION, 2.

#### PARTICULAR RESIDUE.

See RESIDUE, 5, 6.

#### PARTIES.

1. Executors of a deceased tenant for life, Held, improperly made parties to a bill filed to determine the question of election. *Wintour v. Clifton.* 447
2. The question was between the children who survived and those who predeceased their parents. There had been two of the latter, but neither of their estates were represented in the suit. It was asked under the 15 & 16 Vict. c. 86, s. 44, that the surviving husband of one might represent the interests of the absent parties. The application was refused. *Gibson v. Wills.* 620

See DEVASTAVIT.

#### EXONERATION.

#### REPRESENTATION OF INTEREST.

#### PARTITION.

In a suit for partition, the Plaintiff claimed as heir of a deceased tenant in common. The Defendant ignored the Plaintiff's title as heir, and, at the original hearing, an inquiry as to the fact was directed, which was found in favour of the Plaintiff. Held, that the Defend-

## PARTNERS.

Persons may be partners towards the world without being partners between themselves; but if they be partners between themselves, they are undoubtedly partners in respect of the public. *Re Stanton Iron Company.* 164

## PARTNERSHIP.

1. This Court will dissolve a partnership before the expiration of the term, where the circumstances have so changed, and the conduct of the parties is such, as to render it impossible to carry it on without injury to all the partners. *Harrison v. Tennant.* 482
2. The Court dissolved a partnership entered into for a term of years, when, without any breach of the partnership articles, circumstances had so altered, that it could not be carried on upon the footing originally contemplated, and the confidence mutually reposed having ceased, and given place to mistrust, so that it was

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the execution of the will, and had possessed the assets and taken on herself the administration thereof. It prayed revivor against her as such executrix. *A. B.* pleaded simply that she was not executrix. The plea was allowed. *Cooke v. Gittings.* Page 497

PLEADING.

See ABATEMENT.

BREACH OF TRUST, 3.

CONTRIBUTION.

DECREE.

INQUIRY.

JUDGMENT.

PARTIES.

PENALTY.

PLEA.

REVIVOR.

POOR.

See CHARITY, 1.

POWER.

1. Under his marriage settlement, *A. B.* had a power of appointing a fund amongst his children. By his will he appointed the fund equally amongst his eight children; but he afterwards postponed the payment of the capital, partly until the majority of the children, and partly until after the death or marriage of his last surviving unmarried daughter, the unmarried daughters being in the meanwhile entitled to the income. The appointment was held valid. *Wilson v. Wilson.* 25
2. A testator had a power of appointing 10,000*l.* amongst his children,

and in default in trust for them equally. By his will, he gave his son an annuity, to become void if no appointment should be made of the 10,000*l.*, or if any appointment should be made whereby the son would be benefited. The testator only appointed 5,000*l.* in favour of his daughter, and the son took part of the residue in default of appointment. Held, that the annuity had not ceased. *Arnott v. Tyrrell.* Page 49

3. A father having a power to appoint to his children and their issue born in his life, appointed 5,000*l.* to his daughter *O.*, who, on the next day, settled it on herself, her husband and her children generally. Afterwards, by a deed stating the appointment of 5,000*l.* to *O.*, for her separate use, with power to appoint it, the father appointed another fund to *O.* and her children, "upon the trusts and subject to the same provisions as are hereinbefore declared of and concerning the sum of 5,000*l.* hereinbefore appointed unto and for the benefit of *O.*, or as near thereto as circumstances will admit." Held, that *O.* took the second fund for her separate use, with power to appoint it, and that the children took nothing. *Hanbury v. Tyrrell.* 322

4. Under a power to appoint a sum of money to a daughter, an appointment to her husband is invalid, *semble.* *Ibid.*

See APPOINTMENT.

INTEREST.

See POWER OF SALE, 1, 2, 3.  
 PRINCIPAL AND AGENT.  
 RELATIONS.  
 REVOCATION.

#### POWER OF SALE.

1. When a trustee has a power of sale over real estate, with power to give receipts, and it is declared that the purchaser shall not be liable for the misapplication of the purchase-money, the payment to the authorized agent of the trustee, even though he be tenant for life, is not a breach of trust or invalid. *Hope v. Liddell* (No. 1), *Liddell v. Norton*. Page 183
2. A testator being seised of an estate in remainder, subject to the life estate of *A. B.*, devised it to *C. D.* for life, with remainder in strict settlement, and empowered the trustees to sell it, with the consent of the tenant for life "entitled in possession" under his will. *A. B.* surrendered his life estate to *C. D.*, to enable the trustees, with *C. D.*'s consent, to sell: Held, that they could make a good title. *Truell v. Tysson*. 437
3. Distinction between accelerating powers to charge and powers of sale. *Ibid*.

#### PRACTICE.

See ADMINISTRATION SUIT.  
 COSTS, 1, 4, 5.  
 COURT ROLLS.  
 DEVASTAVIT.  
 DISMISSAL FOR WANT OF  
 PROSECUTION.

See EVIDENCE, 3.  
 INQUIRY.  
 LANDS CLAUSES ACT.  
 MORTGAGE.  
 MOTION BY DEFENDANT, &c.  
 PARTITION.  
 PRINTED BILL.  
 PRODUCTION.  
 SOLICITOR AND CLIENT.  
 SPECIAL EXAMINER.  
 STATUTE OF LIMITATIONS, 2.  
 TAXATION.  
 TRUSTEE, 1.

#### PRECATORY WORDS.

Precatory words will not create a case for election, neither will the absence of the execution of a power upon an erroneous impression, stated in the will, that by its non-execution, *A.* (a legatee) will divide the fund equally with *B.* *Langslow v. Langslow*. Page 552

#### PRINCIPAL AND AGENT.

1. A steward has no general authority to enter into contracts for granting leases of farms for a term of years; and therefore, where a steward and land agent, whose powers were specially limited, had, in the name of the owner, entered into a written agreement with a farmer, to grant him a lease for twelve years, but without communicating to him the fact that his power was specially limited: it was held, that the agreement did not bind the owner. *Collen v. Gardner*. 540

2. Where a general authority is given to an agent, this implies a right to do all subordinate acts incident to and necessary for the execution of that authority, and if notice be not given that the authority is specially limited, the principal is bound. *Collen v. Gardner.*

Page 540

#### PRINTED BILL.

1. The Plaintiff having, by a slip, neglected to file a printed bill within fourteen days, in pursuance of his undertaking, was relieved from the consequences upon payment of the costs of the motion. *Ferrand v. The Corporation of Bradford* (No. 2). 422
2. The written bill was taken off the file, the Plaintiff having omitted to file a printed copy within the fourteen days prescribed by the 15 & 16 *Vict.* c. 86, s. 6, and the 3rd General Order of the 7th of *August*, 1852. It being proved, that the omission was a mere slip, and that printed copies of the bill were in Court and in the hands of Counsel, at the hearing of a motion for an injunction within the fourteen days, the Court ordered that the written bill should be restored to the file, and that the printed copy should be received at the Record and Writ Clerks' Office and filed as of the 2nd of *February*. The costs of the motion were ordered to be paid by the Plaintiff to the Defendant, and, notwithstanding the General Order, no costs of suit were to be taxed. *Ibid.*

#### PRODUCTION.

1. The usual order was made for the deposit by the Defendant of all documents in his possession. Some of them consisted of the court rolls of a manor, of which the Defendant acted as steward, but his right to that office was contested. The Court released the Defendant from the necessity of depositing them in Court, and ordered the production at the steward's. *Carew v. Davis.*

Page 513

2. *A. B.* settled property on trust for the Plaintiff and others, but he reserved a power of defeating it. The Plaintiff alleged, that the trusts had been partially defeated by a subsequent deed, and called upon the trustee to produce the trust deed. The trustee in his answer stated, that the Plaintiff's interest had been totally defeated by the subsequent deed, which he did not object to produce, but he said that *A. B.*, who was not a party to the suit, objected to the production. Held, that the Plaintiff was entitled to inspect it, but that the order could not be made in the absence of *A. B.* *Bugden v. Tylee.* 545

#### PUBLIC COMPANY.

1. The clauses of "The Waterworks Clauses Act, 1847," are applicable to "lands and streams," in the same manner as those of "The Lands Clauses Consolidation Act" are applicable to "lands;" and in the mode of compensation, the

same distinction is taken between "lands and streams taken and used" and "lands and streams injuriously affected." *Ferrand v. The Corporation of Bradford*.

Page 412

2. The diversion of a stream is a "taking and using it" within the meaning of the 85th section of the Lands Clauses Consolidation Act, which is incorporated in the Waterworks Clauses Act, and before such diversion can be made, the value of the stream must be ascertained and secured to the owners of the land through which it passes. *Ibid.*

3. Whether by diverting a stream, the river into which it used to flow is "injuriously affected," or "taken and used," *quære*. *Ibid.*

See CONTRIBUTION.

LANDS CLAUSES ACT.

SETTING ASIDE CONTRACT.

#### PURCHASER FOR VALUE.

See INQUIRY.

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#### RAILWAY SHARES.

See SETTING ASIDE CONTRACT.

#### REAL AND PERSONAL ESTATE.

The testator, after directing payment of his debts, devised his real estate to his executors, upon trust to sell, and he directed that the produce should be deemed part of his personal estate, and that the rents,

until the sale, should be deemed part of the annual income of his personal estate, and that the same monies and rents should be subject to the disposition thereafter made of his personal estate and the income thereof; and he bequeathed his personal estate to his trustees to invest it in consols, upon trust to pay certain legacies. Held, that the real and personal estate were blended, and applicable *pari passu* in payment of the debts and legacies. *Simmons v. Rose*. Page 37

See CHARGE OF DEBTS.

ELECTION.

RECOUPING, 4.

#### RECOUPING.

See BREACH OF TRUST, 2, 5.

TRUSTEE *de son Tort*.

#### RECTIFYING DEED.

See REMOTENESS, 2, 3.

#### REFORMING DEED.

Upon a bill to set aside a deed *in toto* the Court will not reform it. *Hartopp v. Hartopp*. 259

See MISTAKE.

REMOVENESS, 2, 3.

#### REGISTRY.

See SHIP, 2, 3, 4.

#### RELATIONS.

A testator gave real and personal estate to *A.* for life, and afterwards to his own relations, in such shares as *A.* should by will appoint. *A.* appointed it amongst

the testator's relations "living at her death," and who were not the testator's next of kin at his death. Held, that the appointment was valid. *Finch v. Hollingsworth*.

Page 112

#### REMOTENESS.

1. A testator bequeathed the income of his residuary estate between his three children, and when any child died, his part to be equally divided amongst the testator's surviving grandchildren; and likewise, if any of his grandchildren died, their part to be divided amongst the survivors of his other grandchildren. Held, that the gift over, upon the death of a grandchild to the surviving grandchildren, was void for remoteness. *Courtier v. Oram*. 91
2. A trust fund was limited, after the death of husband and wife, and in default of appointment, to their children equally, to be a vested interest in, and to be paid, transferred or assigned to, sons at twenty-five, and daughters at twenty-five or marriage, with benefit of survivorship in case of death under twenty-five, and as to daughters, in case of being unmarried. Held, that the limitation was void for remoteness. *In re Morse's Settlement*. 174
3. But leave was given to produce evidence that the intention of the parties was not carried out, and to have the settlement rectified. *Ibid*.
4. Devise in trust for *A.* for life, and, after her decease, to apply the

rents for the benefit of her children, until the youngest attained twenty-five; and, as soon as the youngest should have attained twenty-five, to sell, and "pay and divide" the produce equally "among such of the children of *A.* as should be then living, and issue of such, if any, of her children as might be then dead," such issue to take their parents' share only. Held, that the gift of the income was valid, but that the gift of the *corpus* was void for remoteness. *Read v. Gooding*. Page 478

#### RENEWAL.

See MUNICIPAL CORPORATION ACT.

#### REPRESENTATION OF INTEREST.

Where the entire adverse interest is unrepresented by any party to the suit, the Court will not appoint a person to represent that interest, under 15 & 16 Vict. c. 86, s. 44. *Gibson v. Wills*. 620

#### RESIDUARY LEGATEE.

1. In a will, the words "I constitute *A.* and *B.* my residuary legatees will not pass real estate." *Windus v. Windus*. 373
2. A testator gave several pecuniary legacies, including one to his son *A.*, and devised his freehold, copyhold and leasehold estates to his sons *B.* and *C.* as tenants in common, and appointed them his executors. *B.* died, and by a codicil the testator appointed *A.* executor in the room of *B.*, and revoked the





RESULTING TRUST.

See CHARITY, 2.

REVIVOR.

- A Defendant, having been served with subpœna, died before appearance. Held, that the suit could not be revived against his heir, but that the remedy against him, if any, was by original bill. *Bland v. Davison*. Page 312

See ABATEMENT.

PLEA.

REVOCATION.

1. An appointment made in 1840, of the whole fee, under a power in a settlement of 1825, relimiting in substance the old estates, though made for the purpose and with the sole intention and object of introducing a limitation omitted from the settlement by mistake. Held, to be a revocation of a will made in 1827, in pursuance of a power in the settlement of 1825. *Walker v. Armstrong*. 284
2. In such a case parol evidence is inadmissible to shew what was the intention or object of the parties. *Ibid*.
3. On the marriage of *A.* and *B.* in 1824, two estates belonging to *B.*, the wife, were vested in trustees upon certain trusts in favour of *A.* and *B.* and the issue of the marriage, but by mistake no provision was made for the daughters of any son of the marriage, and, as to one of the estates, no power of disposing of it was given to *B.* in case there should be no issue of the marriage. The blunder being discovered, *A.* and *B.*, in 1825, under a general power of appointment given them by the settlement, paramount to the limitations therein, relimited the estates to the the old uses (except as to the life estates to themselves and the survivor of them, which were omitted by a second mistake), and supplied the omission in the original settlement. There being no issue, *B.*, in 1827, made her will in pursuance of the power "reserved to her by the original settlement and every other power enabling her in that behalf." The second blunder being afterwards discovered, in 1840, *A. B.*, under the general power, appointed to the old uses, and supplied the second omission. This deed of appointment recited the intention of *A.* and *B.* to vary the limitations, and it was clear in the opinion of the Court that the sole intention and object of the appointment was to cure the second blunder. Held, nevertheless, that the will of *B.* was revoked. But upon appeal the Lords Justices, on an altered record, reformed the deed of 1840, and so gave effect to the will. *Walker v. Armstrong*. Page 284
4. Under his marriage settlement, *A. B.* had power to appoint the reversion in fee of the settled estate, and the trustees had a power of sale with his consent. *A. B.*, by his will, appointed it to trustees, to sell and stand possessed of the produce in trust for a class; and

had not been received. Field,  
notwithstanding the 1 Vict. c. 26,  
ss. 19, 23, that the gift to the class  
was inoperative, and that the pur-  
chase-money passed, under the  
residuary gift, to the widow. *Gale*  
*v. Gale*. Page 349

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**SALE.**

*See*

*See* JUDGMENT.

MORTGAGE.

**SEPARATE USE.**

*See* HUSBAND AND WIFE.

**SETTING ASIDE CONTRACT.**

The Plaintiff and Defendant were  
Directors in a railway company.  
The Plaintiff was desirous of ob-  
taining 1,000 "unallotted" shares,  
in order to promote its success.  
The Defendant clandestinely  
caused 1,000 of his own "allotted"  
shares to be transferred to the

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2. The policy of the Ship Registry Act, in disregarding interests not appearing on the register, is inapplicable both to the money arising from the sale of a ship and to the produce of the freight. *Armstrong v. Armstrong* (No. 2). Page 78
3. Where a party who appears on the register to be the absolute owner of a ship, enters into an agreement for valuable consideration, admitting he is a trustee, and engaging to sell the ship and hand over the produce to the true owner, the Court, notwithstanding the Ship Registry Act, will enforce the agreement. *Ibid.*
4. Shares in a ship purchased with *A.*'s money were registered in *B.*'s name. After *A.*'s death, *B.* entered into an agreement with his representatives, admitting their right and for valuable consideration agreeing to sell the shares at the end of twelve months, and to account to the representatives for the proceeds. *B.* accordingly sold to *C.* Held, that though the Ship Registry Act prevented the representatives enforcing any right against the ship itself, still that they were entitled to recover the purchase-money in the hands of *C.* *Ibid.*

#### SOLICITOR AND CLIENT.

An order was made upon a solicitor for the delivery of his bill within fourteen days. He was unable to comply, and on a motion for the second order, he asked for further time. It was given, but he was

ordered to pay the costs of the motion. *In re Dendy*. Page 565  
*See* COSTS, 1, 2, 3.

TAXATION, 7, 8, 9, 10, 11.

#### SPECIAL EXAMINER.

1. Special examiners are entitled to a fee of five guineas a day only, and *semble*, their clerks are entitled to five shillings *per diem*. No extra fee is payable for extended time employed during a day, nor for the preliminary labour of reading the papers. *Payne v. Little*. 65
2. Disinclination of the Court to appoint special examiners, on account of the great expense it entails on the suitor. The *Master of the Rolls* will not appoint one except in cases of absolute necessity. *Brocas v. Lloyd*. 519

#### SPECIFIC LEGACY.

*See* RESIDUE, 1, 2.

#### SPECIFIC PERFORMANCE.

*See* CONDITIONS OF SALE.

CONTRACT.

VENDOR AND PURCHASER.

#### STATUTE.

- 1 *Will.* 4, c. 40.

*See* EXECUTOR.

- 5 & 6 *Will.* 4, c. 76.

*See* MUNICIPAL CORPORATION  
ACT.

- 1 *Vict.* c. 26, ss. 19, 23.

*See* REVOCATION, 4.

- 15 & 16 *Vict.* c. 86, s. 6.

*See* PRINTED BILL.

15 & 16 *Vict.* c. 86, s. 44.

See PARTIES, 2.

REPRESENTATION OF INTEREST.

16 & 17 *Vict.* c. 86, s. 48.

See JUDGMENT.

MORTGAGE.

#### STATUTE OF LIMITATIONS.

1. Where by underground working the Defendant had taken the coal of his neighbour, the Court limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the *onus* of proof would lie on the wrongdoer to shew that it was not taken within the six years. *Dean v. Thwaite.* Page 621
2. *Semble*, the account would not be so limited, if the coal had been abstracted intentionally, and steps had been taken to conceal the fact and prevent discovery. *Ibid.*

#### STAYING SUIT.

See MOTION BY DEFENDANT TO  
STAY PROCEEDINGS.

#### STEWARD.

See COURT ROLLS.  
PRINCIPAL AND AGENT.  
PRODUCTION, 1.

#### SUBPARTNERSHIP.

See PARTNERSHIP, 3.

#### SUPPRESSION OF FACTS.

See TAXATION, 8, 10.

#### SURVIVORSHIP.

1. Devise of real estate to three daughters for life, and after their

decease to three grandchildren as tenants in common in fee; and in case of either of the grandchildren dying in the lifetime of the daughters, the share of them so dying to be "transferred" to the "survivors," and if only one should be living, then to him or her so "surviving." The survivor of the daughters outlived the three grandchildren. Held, that the survivorship had reference to the death of the last tenant for life and not to a survivorship between the grandchildren; that the divesting clause never took effect, and that on the decease of the survivor of the three daughters the heirs of the three grandchildren took as tenants in common in fee. *Littlejohns v. Household.* Page 29

2. Bequest to four persons equally, and "in case of the death" of any or either of them "in the lifetime of the other or others," their shares to go to "survivor or survivors of them." Held, that the survivorship had reference to the period of the testator's death. *Howard v. Howard.* 550

#### SWORN BROKER.

See PENALTY.

#### TAXATION.

1. A bill by an incumbrancer of an alleged remainderman against the tenant for life for production of the title-deeds, and involving

questions of title, was dismissed with costs. Upon the taxation, a charge was made for an abstract of title-deeds. Held, that the word "abstract" was intentionally omitted from the 120th General Order of May, 1845, and that the charge for the abstract could not be allowed if it exceeded that of a copy of the documents; secondly, that no such charge could be allowed for an abstract made before the suit, though with a view to an arrangement between the same parties; but thirdly, that a copy of it for the use of the Counsel who prepared the answer might be allowed. *Davis v. Earl of Dysart* (No. 2). Page 124

2. Fees to two junior Counsel (one of them being a Conveyancer only) to settle the answer, cannot be allowed as between party and party, unless by special order of the Court. *Ibid.*
3. A charge for abbreviating the answer, estimating it at its total length, including schedules, is proper, and to be allowed on a taxation between party and party. *Ibid.*
4. Where, by arrangement, exceptions to an answer were heard with the cause, a charge for consultation between Counsel on the exceptions, as distinct from the consultation on the hearing of the cause, was allowed. *Ibid.*
5. A charge for copies only of those parts of the interrogatories, the answers to which were excepted to, can be allowed for the purposes of the consultation on the

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exceptions, as distinct from the copies made for the purpose of preparing the answer; for which latter purpose, also, only one copy to one junior Counsel can be allowed. *Davis v. Earl of Dysart* (No. 2). Page 124

6. Upon a taxation between party and party, the bill of costs may be added to or varied after it has been brought into the office, at any time before the taxation is concluded; but the practice is different upon a taxation under the Solicitors' Act. *Ibid.*
7. Taxation ordered, at the instance of *cestuis que trust*, of a bill incurred in respect of a trust estate, by trustees both being now dead; but any balance due from the solicitor was ordered to be paid into Court to a separate account and not to the Petitioners. *In re Hallett*. 250
8. A client obtained an order of course for the taxation of his solicitor's bill. A special agreement existed between them, which ought to have been mentioned on the application; but this was in the possession of the solicitor, who refused to furnish a copy. The Court declined to discharge the order, though irregular. *Re Ingle*. 275
9. Agreement between a solicitor and his client, an illiterate person, for payment of his bills (taken at a given amount), solely out of the produce of some property, the subject of the suit. Held, not to preclude taxation. *Ibid.*

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TRUSTEE DE SON TORT.

Where *A.*, (a stranger to the trust,) assuming to exercise a trust for sale, conveys the estate to a purchaser, if this Court afterwards compels the purchaser to restore the land to the *cestui que trust*, the purchaser will be entitled to all the assistance which this Court or the *cestui que trust* could give him, to recover from the self-constituted trustee the purchase-money still in his hands, or for which he might remain liable. *Hope v. Liddell* (No. 1), *Liddell v. Norton*.  
Page 183

TRUST ESTATE.

See DEVISE.

TRUST FOR SALE.

See EXONERATION.

UNDUE INFLUENCE.

See PARENT AND CHILD.

VENDOR AND PURCHASER.

1. When an offer in writing is made by the owner to sell an estate on specified terms, and this is unconditionally accepted, there is a binding contract, which neither party can vary, but the owner is entitled, at any time before his offer has been definitely accepted, to add any new terms to his proposal. If these be refused, the treaty is at an end. *Honeyman v. Marryat*.

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2. The time for paying the deposit may be made an essential term for entering into a contract for sale of an estate. *Honeyman v. Marryat*. Page 14
3. The plaintiff's solicitor wrote to the Defendant's agent, that he was instructed to make him an offer of 25,000*l.* for the purchase of his estate. The Defendant's agent wrote, in answer, that he was authorized to accept the offer, "subject to the terms of a contract being arranged" between the two solicitors. Held, that this was not a concluded contract. *Ibid.*
4. In the above case, the owner's solicitor sent the draft of an agreement for the perusal of the purchaser's solicitor, which, amongst other stipulations, required a deposit of 1,500*l.* to be paid down. This term was objected to, and, after some delay, and before the Plaintiff had acceded to it, the Defendant required it to be paid and the agreement signed before a given day, or the treaty to be at an end. This was not complied with, but an offer was subsequently made to sign the agreement and pay the deposit required, but which was refused. Held, that there was no contract that this Court could enforce. *Ibid.*

See CONDITIONS OF SALE.

LIEN.

TITLE DEEDS.

VESTED INTEREST.

See LAST ANTECEDENT.

VESTING.



## VESTING.

Bequest of residue to *A.* for life, and after her decease, a gift of 3,000*l.* each to *B.* and *C.* (granddaughters), for their absolute use; and if either of them should be dead at the decease of *A.*, her 3,000*l.* was to go to the granddaughter who should be then living; but in case such granddaughter should have left children, they were to take her legacy. *B.* died first, leaving children; *C.* then died without issue, leaving *A.* surviving. On the death of *A.*: Held, that *C.*'s legacy was vested and passed to her representatives. *In re Bright's Trusts.* Page 67

## VOLUNTARY DEED.

See FRAUDULENT DEED.

## VOLUNTEER.

See COMPENSATION.

## WATERWORKS.

See PUBLIC COMPANY.

## WILL.

1. Where a testator gave the income of a fund to his sister (then sixty-eight years of age and married to a second husband) for life, and after her decease, bequeathed the fund to her children "by her then present or any future husband," and she had children by both her first and second husbands, it was held, that the children by her former marriage

were not excluded. *Pasmore v. Huggins.* Page 103

2. In construing a will words may be supplied, changed and transposed, whenever the context requires it. *Abbott v. Middleton.* 143

3. Bequest to testator's widow for life, and on her decease to his son for life, and on his demise the principal to become the property of any children he might leave. Then followed a gift over in case the son died before his mother (omitting the words "without leaving children"). The son predeceased both his father and mother, leaving an only child, who survived them. Held, that such child was entitled to the principal sum after the grandmother's death; and that to effectuate the intention of the testator, the words "without leaving any child" must be implied after the word "dying." *Abbott v. Middleton.* 143

4. As a general rule, when a bequest is to take effect after the failure of a prior gift, the total failure of the latter does not prevent the ulterior bequest taking effect. *Tennant v. Heathfield.* 255

5. Distinction between a series of limitations all dependent on the same contingency, and successive limitations, each intended to take effect upon the failure of all those prior to it. *Ibid.*

6. A testatrix, by her will, gave to *A.*, *B.* and *C.* distinct legacies, and she appointed *A.* and *B.* executors, and gave "to her execu.

tors, *A.* and *B.*," her residuary estate. By a codicil she appointed *C.* executor and trustee of her will, "as if his name had been inserted therein as a trustee and executor," and a legacy for his trouble, "in addition to the benefit he derived under her will," and she declared, that her trust estate should vest in *A.*, *B.* and *C.*, and confirmed her will in all other respects. *C.* claimed one-third of the residue, but the Court held that it was divisible between *A.* and *B.* *Hillersdon v. Grove.*

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See "AND" read "OR."

APPOINTMENT, 2, 4.

BEQUEST.

CHARGE OF DEBTS.

CHILDREN.

CLASS.

CONDITION.

CONSTRUCTION.

CONTINGENCY.

CONTINGENT ESTATE.

DEVISE.

ELECTION.

EXECUTOR.

GIFT OVER.

LAPSE.

LAST ANTECEDENT.

LEGACY.

LIFE INTEREST.

MORTMAIN.

NEXT OF KIN.

NOTICE, 1.

POWER, 1, 2.

POWER OF SALE.

PRECATORY WORDS.

REAL AND PERSONAL ESTATE.

RELATIONS.

REMOTENESS, 1, 4.

RESIDUARY LEGATEE.

RESIDUE.

REVOCATION.

SURVIVORSHIP.

VESTING.

#### WINDING-UP ACT.

Two traders, becoming embarrassed, assigned their joint and separate estate to trustees, to carry on the business for the benefit of their creditors, parties to the deed, and to pay the surplus to the traders. The trustees accordingly carried on the business, under the name of a company, until it became embarrassed. Held, that such a company was not within the provisions of the Winding-up Acts. *Re Stanton Iron Company.* Page 164



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